85-849

Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
Petitioners,

v.

AMADO SALAZAR CALDERON, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 18, 1985

QUESTIONS PRESENTED

1. Whether an association of small farmers, formed at the suggestion of government officials to facilitate the H-2 application process, "intentionally" violated the Farm Labor Contractor Registration Act ("FLCRA") within the meaning of the liquidated damages provision where the association's members had absolutely no idea that the association might be deemed to be a farm labor contractor subject to the requirements of FLCRA, the government agency responsible for administering FLCRA at no time suggested that the association might be subject to FLCRA, and the district court offered no explanation for its conclusory finding that the association's violations of FLCRA were "intentional."

2. Whether growers were required to provide a ¾ work guarantee to Mexican workers admitted into the United States on a temporary basis where the growers never offered to provide such a guarantee in their petitions to the government and the U.S. Department of Labor, contrary to its own regulations, never cited the absence of a ¾ guarantee as a reason for denying approval of the petition, thus failing to put the growers and the Immigration and Naturalization Service on notice that a waiver of the ¾ requirement might be necessary.

3. Whether the court of appeals acted properly in reopening, on its own initiative, the question of whether the plaintiffs had waived actual FLCRA damages where the plaintiffs had from the beginning sought only liquidated FLCRA damages, the plaintiffs had refused to answer defendants' interrogatories seeking to ascertain actual damages, the district court had expressly ruled that plaintiffs had voluntarily waived actual damages, plaintiffs did not appeal from the district court's ruling, and the court of appeals itself acknowledged that plaintiffs had waived their rights to actual damages.

PARTIES TO THE PROCEEDING BELOW

The respondents before this Court, who were plaintiffs in the district court and appellants-cross appellees in the court of appeals, are Mexican farm workers residing in the area of Ojinaga, Chihuahua, Mexico, who were admitted as temporary foreign workers (H-2 workers) pursuant to Immigration and Naturalization Service authorization to work in the Presidio Valley of Texas in 1977-78.

The petitioners before this Court, who were defendants before the district court and appellees-cross appellants before the court of appeals, are the following individuals, partnerships, and corporations that farmed in the Presidio Valley of Texas in 1977-78 and an unincorporated association of those individuals, partnerships and corporations:

Presidio Valley Farmers Association
Carlos S. Armendariz
Luis Armendariz
Terry Bishop
Calixtro Carrasco
Jesus B. Carrasco
Teofilio Carrasco
Rosendo Evaro
Madeira Valley Farms
Ruben H. Madrid
Hector Morales
Trinidad Pena
Presidio Valley Farms, Inc.
Oscar Spencer
Joe Turner
Alberto Armendariz
Francisco Armendariz
Billy Joe Bishop
Larencio Brito
Demetrio Carrasco
Pablo O. Carrasco
Flavio Estrada
K.C. Produce
Raul Madrid
Cecilio Morales
Antonio Pena
Presidio Produce, Inc.
Jose Rodriquez
Victor Thiel
Charlie Weinacht

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In The

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October Term, 1985

No. 85-

Presidio Valley Farmers Association, *et al.*,
Petitioners,

v.

Amado Salazar Calderon, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DECISIONS BELOW

On February 2, 1982, the United States District Court for the Western District of Texas, Pecos Division, issued its order denying defendants' motion for summary judgment. The order, which is unreported, appears at Appendix A hereof. On January 24, 1983, the district court issued its memorandum opinion and order dealing with certain issues in the liability phase of the case. The opinion, which is unreported, appears at Appendix B hereof. On February 6, 1984, the district court issued its memorandum opinion and order dealing with the damages phase of the case. The opinion, which is unreported, appears at Appendix C hereof. The judgment appears at Appendix D hereof. On March 2, 1984, the district court issued an order denying defendants' motion for reconsideration, which appears at Appendix E hereof.

On July 25, 1985, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming in part

and reversing in part the decision of the district court. The decision of the court of appeals, which is reported at 765 F.2d 1334 (5th Cir. 1985), appears at Appendix F hereof. Petitioners' timely petition for rehearing and respondents' timely petition for rehearing were both denied by the court of appeals on September 19, 1985. The court's order denying the petitions for rehearing appears at Appendix G hereof.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). Petitioners' and respondents' timely petitions for rehearing were denied by the court of appeals on September 19, 1985.

STATUTES INVOLVED

The statutory and regulatory provisions involved in this proceeding are the private civil relief provision of the Farm Labor Contractor Registration Act, 7 U.S.C. § 2050a (1977), and a provision of the U.S. Department of Labor's temporary foreign labor certification regulations, 20 C.F.R. § 602.10 (1977), which are set forth in Appendix I.

STATEMENT OF THE CASE

The Presidio Valley of Texas is a small, remote and sparsely populated farming area located on the border with Mexico approximately 200 miles southeast of El Paso. The Presidio Valley contains two towns, Presidio, which is located directly across the border from Ojinaga, Chihuahua, Mexico, and Redford, 16 miles downstream from Presidio. Over the years, the farmers in the Presidio Valley have grown several crops, the principal ones being onions and cantaloupes, both of which must be harvested by hand labor. Because of its proximity to Mexico and its remote location, farmers in the Presidio Valley traditionally relied on undocumented Mexican workers to harvest their crops.

In March, 1977, Border Patrol agents informed growers in the Presidio Valley that they were stepping up enforce-

ment efforts in the area in order to put an end to the long-standing practice of using undocumented Mexican workers to harvest crops and perform other farm labor. Realizing the impact the new enforcement policy would have on the growers who had already planted their crops, Immigration and Naturalization Service ("INS") officials informed the growers about the so-called H-2 program, which authorizes the admission of temporary foreign workers into the United States under certain circumstances.[1] The growers had never heard of the H-2 program before, but they took steps to investigate and find out about the feasibility of bringing in legal foreign workers to harvest their crops.

The growers first went to the Texas Employment Commission office in Pecos, Texas where they filed, in their individual names, clearance orders and job offers for alien employment. Since the officials at the TEC office were not familiar with the H-2 program, the growers travelled to the TEC office in Austin, Texas, which referred the growers to the U.S. Department of Labor ("USDOL") office in Dallas, Texas. During the course of their meetings, USDOL officials suggested that the growers form an association in order to facilitate and expedite the certification process. No USDOL official mentioned to the growers the possibility that the association would have to register as a farm labor contractor.

[1]The admission of "nonimmigrants" to perform temporary labor in the United States when enough qualified unemployed United States workers are not available is authorized by the Immigration and Nationality Act of 1952, specifically 8 U.S.C. § 1101(a)(15)(H)(ii) and § 1184(c). The Commissioner of the INS has delegated to the U.S. Secretary of Labor the responsibility for initially determining whether enough qualified American workers are available to fill a particular job and whether the admission of temporary foreign workers will adversely affect United States workers. 8 C.F.R. § 214.2(h)(3) (1985). The U.S. Secretary of Labor has promulgated regulations prescribing the standards under which he will certify an employer's need to hire temporary foreign workers. During the year in question, those regulations were contained at 20 C.F.R. § 602.10-602.10b (1977). The regulations are now contained at 20 C.F.R. Part 655 (1985).

Following the advice of the USDOL officials, the growers formed the Presidio Valley Farmers Association in early April, 1977.[2] After the Association was formed, the growers submitted two petitions with the District Director of INS in El Paso,Texas on April 18, 1977. The petitions were submitted in the name of the Association.

The U.S. Department of Labor denied the growers' request for labor certification on March 30, 1977. The denial letter stated that, "[b]ased on the fact that the prospective employers do not have housing that meets the requirements of 601.10, labor certification cannot be considered."[3] Despite the refusal of the USDOL to certify the growers' need for temporary foreign workers, the District Director of INS approved the Association's petitions on April 21, 1977. The District Director stated that he approved the petitions because ". . . the petitioner has established independently that unemployed persons capable of performing the labor are unavailable in this country." The District Director noted that the USDOL had denied certification on the ground that there was not proper housing available but that the growers had stated that no housing was necessary in that the Mexican workers lived in the area adjacent to Presidio and would return to their homes each night. The District Director concluded that the USDOL's opinion was only advisory and not binding on the INS, that the USDOL's refusal was based solely on the shortage of housing and not on the basis of the availability of workers, and that housing was not pertinent to his decision.

The District Director's decision was automatically certified to the Regional Commissioner of INS in Dallas, Texas, who

[2]The Association had no paid employees. Members were initially assessed $1.00 per acre to defray expenses. By June 21, 1977, the Association had collected a total of $2,760 and had spent a total of $241.65 on such items as secretarial services, postage, printing forms, and newspaper advertisements. For the most part, the individual growers themselves paid for their expenses, such as telephone calls and the cost of travelling and were never reimbursed for these expenses by the Association.

[3]Appendix H, at A-66.

reversed the District Director and denied the petitions on April 27, 1977. The Commissioner of INS then exercised his authority under 8 C.F.R. § 103.4 and directed that the case be certified to him for decision. Over the next month and a half, attempts were made to arrive at a solution to the problem. In the meantime, it became apparent that the lack of harvest labor would cause great economic hardship to the Presidio Valley.

Finally, on June 9, 1977, the Acting Commissioner of INS exercised the discretionary authority vested in him by the Immigration and Nationality Act of 1952 and approved the growers' petitions. After noting the grievous financial loss that the Presidio Valley faced if the crops could not be harvested, the Commissioner observed that the USDOL's certification decision was merely "advisory," there was no need for housing since the Mexican workers resided nearby, and there were not sufficient U.S. workers to harvest the crops.

The Mexican workers admitted on the H-2 visas began coming into the U.S. on June 10, 1977. On April 27, 1979, six H-2 workers filed a class action lawsuit in the U.S. District Court for the Western District of Texas, El Paso Division. When the El Paso Division denied class certification, 251 members of the putative class filed a new lawsuit in the Pecos Division and the original lawsuit was ultimately transferred and consolidated with the Pecos Division case. At the urging of the plaintiffs, the action was divided into a liability phase and a damage phase. The district court issued its decision on the liability phase on January 24, 1983. Basically, the court decided that the Association had acted a farm labor contractor within the meaning of FLCRA. The district court also decided that the growers were not required to pay the workers the unpublished adverse effect wage rate of $2.83 per hour nor to guarantee employment for ¾ of the visa period, as the plaintiffs had claimed. After lengthy proceedings, the district court ultimately issued its judgment awarding a total of $53,550 in liquidated FLCRA damages to 159 plaintiffs. Both parties appealed to the Fifth Circuit, which rendered its decision on July 25, 1985, af-

firming in part and reversing in part the decision of the district court.

REASONS FOR GRANTING THE WRIT

I. The District Court And Court Of Appeals Interpreted And Applied The "Intentional" Requirement Of The Liquidated Damages Provision Of FLCRA In A Manner That Conflicts With This Court's Recent Decision In *Trans World Airlines, Inc. v. Thurston* And, By Treating Knowledge Of The Act's Applicability As Irrelevant, Have Rendered Nugatory The Act's Requirement That Violations Be "Intentional" To Justify An Award of Damages.

The civil liquidated damages provision of the Farm Labor Contractor Registration Act ("FLCRA") authorized a trial court to award actual damages or liquidated damages up to $500 for each FLCRA violation[4] to a person claiming to be aggrieved by the violation of FLCRA only "if the court finds that the respondent has *intentionally* violated any provision of this Act . . . ." 7 U.S.C. § 2050a(b) (1977).[5] Both the district court and the court of appeals interpreted and applied the "intentional" requirement of the liquidated damages provision of FLCRA in a manner which conflicts with this Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___ , 105 S.Ct. 613 (1985).

In the *Trans World Airlines* case, the Court held that a violation of the Age Discrimination in Employment Act

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[4]The district court awarded a total of $53,500 in liquidated damages for six FLCRA violations to 155 plaintiffs, but it could have awarded a total of $465,000 in liquidated damages to those plaintiffs ($500 per FLCRA violation) or conceivably a total of $2,427,000 had the court certified the class of 809 persons as requested by plaintiffs.

[5]Although the Farm Labor Contractor Registration Act was repealed effective April 14, 1983 by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 *et seq.*, the latter act continued into effect many of the provisions of FLCRA including a substantially similar civil liquidated damages provision containing the same requirement of "intentional." *Cf.* 7 U.S.C. § 2050a (1977) and 29 U.S.C. § 1854 (1985).

("ADEA") was "willful"[6] within the meaning of the civil, liquidated damages provision of ADEA only if "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S.Ct. at 625-26. The Court rejected the argument that the term "willful" should be interpreted in the same manner that several courts, including the Fifth Circuit in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), had interpreted the statute of limitations in Fair Labor Standards Act cases, noting that

> We are unpersuaded by respondents' argument that a violation of the Act is "willful" if the employer knew of the potential applicability of the ADEA. Even if the "in the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondents would result in an award of damages in almost every case . . . .

105 S.Ct. at 625.

In the instant case, the district court rejected the growers' argument that any violation of FLCRA by the newly-formed Association could not have been "intentional" since the Association was only formed at the suggestion of government officials to facilitate the paper work involved in the H-2 certification process and the growers were totally unaware that the Association might be deemed a farm labor contractor subject to all the requirements of FLCRA.[7] The district court

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[6]The terms "willful" and "intentional" are used virtually interchangeably. *See United States v. Illinois Central R. Co.*, 303 U.S. 239, 243 (1938), and *Blackwell v. Sun Electric Corporation*, 696 F.2d 1176, 1184 (6th Cir. 1983). *Cf. Local 189, United Papermak. & Paperwork. v. United States*, 416 F.2d 980, 995-96 n. 15 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) ("The only significant difference between the two versions is the substitution of "intentionally" for "willfully" and there is no indication that any strengthening of the requirement was meant.").

[7]The growers submitted a motion for summary judgment on the ground that any violations of FLRA could not have been "intentional"

stated "... that 'intentionality,' as used in 7 U.S.C. § 2050a(b), refers to the common civil standard which holds a person liable for the natural consequences of his or her acts."[8] The district court later declared that ". . . no proof need be offered of any specific intent to ignore and violate the Act, Plaintiffs need only show that the violations were the natural and foreseeable consequences of their intentional acts . . . ."[9] The district court at no point explained why it considered the Association's violations of FLCRA to be intentional. The district court merely made the conclusory finding that the Association's violations of FLCRA were intentional.

The court of appeals upheld the district court's conclusory finding that the Association's FLCRA violations were "intentional." The court of appeals noted that

> Defendants also argue that their violations were not intentional because they were unaware of the FLCRA and the necessity of complying with it. The argument is without merit. Were we to require that a defendant have knowledge that he was violating the FLCRA before labelling his actions 'intentional,' we would change the intent standard to one of 'specific intent,' a standard we rejected in *Castillo*. The focus under the standard we adopted there is on the deliberateness of the conduct involved, not the defendant's knowledge of the Act.[10]

The application of the "intentional" requirement in this case by the district court and the court of appeals was wrong on three counts. First, the court of appeals distinguished this Court's *Trans World Airlines* decision on the ground that the civil liquidated damages provision of the ADEA was "intended to be punitive in nature," whereas "the courts have construed the 'intent' requirement necessary to trigger

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since none of the growers had any idea that the Association was a farm labor contractor within the meaning of FLCRA. The district court denied the motion for summary judgment. *See* Appendix A, at A-1.

[8]Appendix A, at A-1.

[9]Appendix C, at A-18.

[10]Appendix F at A-48 n. 5.

the damages provisions of the FLCRA so as to further the Act's *remedial* purposes."[11] Nevertheless, the court of appeals one page later declared that "the purpose of the civil remedy is both compensatory and punitive,"[12] thus contradicting its own rational for distinguishing the *Trans World Airlines* case. Furthermore, the court of appeals and other courts have held that the trial court may award liquidated FLCRA damages even when there were no actual damages and that liquidated damages do not have to bear any relationship to actual damages.[13]

Secondly, both the district court and the court of appeals refused to read a requirement of "knowledge" into the "intentional" requirement of FLCRA on the ground that it would make the intentional requirement one of "specific intent," a position that is directly contrary to this Court's decision in *Trans World Airlines* and to the Second Circuit's decision in that case. Both this Court and the Second Circuit drew a distinction between knowledge that conduct is prohibited by an Act and evil motive or bad purpose. 105 S.Ct. at 624 n. 19; *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983) (". . . plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.")

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[11]Appendix F, at A-48.

[12]Appendix F, at A-50.

[13]*See Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985) ("The legislative history of the Act and the decisions interpreting it make it clear that the purpose of this civil remedy is not restricted to compensation of individual plaintiffs. It is designed also to promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market."); *Alvarez v. Joan of Arc*, 658 F.2d 1217, 1224 (7th Cir. 1981) (an award of liquidated damages "when no actual damages were shown . . . was justified by the wording of 2050a(b) and its legislative history"); *Espinoza v. Stokely-Van Camp*, 641 F.2d 535, 538-39 (7th Cir. 1981).

Thirdly, the district court's finding that the Association "intentionally" violated FLCRA was, at best, conclusory, since the district court offered no explanation for why it considered the Association's FLCRA violations to be intentional[14] and even referred to "Defendants' failure to comply with a law they claim they had no knowledge of."[15] This Court has held numerous times that "statements conclusory in nature are to be eschewed." *See e.g. Dalehite v. United States*, 346 U.S. 15, 24 n. 8 (1953); *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960). *See also Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1981). Such a conclusory finding was especially inappropriate in this case where the Association not only was formed at the suggestion of officials of the USDOL, the very agency empowered to administer FLCRA, but the USDOL remained unaware that the Association was a farm labor contractor despite its extensive dealings with the Association.[16]

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[14]The court of appeals stated that ". . . the record contains sufficient evidence to support a conclusion that the defendants were aware of FLCRA." Appendix F, at A-48 n. 5. To the extent the court of appeals thereby sought to correct the deficiency of the district court's conclusory finding, it represented unwarranted usurpation of the district court's fact finding responsibility. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982). Petitioners vigorously chalienge the court of appeals' reading of the evidence. The "evidence" did not establish that the growers' had any awareness that the Association was subject to FLCRA. The clearance orders referred to by the court of appeals were filed with the Texas Employment Commission *before* the Association was even formed. Moreover, the boilerplate statement contained on the clearance orders ("I hereby assure that the working conditions of my order comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration, and other employment related laws . . . .") referred to many other laws, other than farm labor contractor laws, which could hardly be said to put the growers on notice concerning the details of those myriad laws.

[15]Appendix C, at A-19.

[16]The USDOL's employment service regulations at the time stated that "no local office shall service a farm labor contractor on a job order for agricultural workers unless the farm labor contractors shows a valid Federal Farm Labor Contractor (FLC) certificate, where required by

The same reasoning this Court applied to the liquidated damages provision of ADEA applies with equal, if not greater, force to this case. In the *Trans World Airlines* case, this Court found that the violation was not "willful" where the defendant was fully aware of the potential applicability of the ADEA and consulted with its attorneys regarding compliance with the Act. In this case, the defendants had no idea that that FLCRA was even "in the picture." The net effect of the district court's and court of appeal's determination and application of the "intentional" requirement of FLCRA is to read that requirement out of the Act and to lead to the imposition of liquidated damages in virtually every case.

II. The Court Of Appeal's Reversal Of The District Court On Whether The Growers Were Required To Provide A ¾ Work Guarantee To Mexican Workers Constituted Unwarranted Fact Finding By The Court Of Appeals And Violated Basic Principles Of Administrative Law As Expressed In Numerous Decisions Of This Court.

The court of appeals reversed the district court and held that the growers were required by the USDOL's H-2 certification regulations to provide the Mexican workers with a ¾ work guarantee even though the growers had never offered to provide such a guarantee in any of the documents they filed with the USDOL and INS. The court of appeals reasoned that the ¾ guarantee requirement contained in the USDOL's labor certification regulations was required to be provided by the growers since it had not been expressly waived by the INS even though the record clearly established that the USDOL, contrary to its own certification regulations, had never cited the absence of a ¾ guarantee as a reason for denying certification and thus

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Federal law." 20 C.F.R. § 653.104(b) (1977). The government agency with the expertise apparently did not realize that the Association was a farm labor contractor and dealt with the Association in violation of its own regulations.

failed to put the growers and INS on notice that a waiver of this requirement might be necessary. In reaching its decision, the court of appeals invaded the fact-finding province of the district court and violated numerous principles of administrative law.

The growers started the H-2 application process in March, 1977 by filing so-called Clearance Orders with the Texas Employment Commission, as required by the USDOL's H-2 certification regulations. The Clearance Orders, which were prepared by the growers with the advice and assistance of TEC officials, did not offer employment for ¾ of the work period. By letter dated March 30, 1977, Troy Cargill, the Certifying Officer of the USDOL, notified the growers that "[b]ased on the fact that the prospective employers do not have housing that meets the requirements of 602.10, labor certification cannot be considered."[17] The USDOL's certification regulations expressly stated that, in denying certification, the USDOL would notify the employer and that "such notification shall contain a statement of reasons on which the refusal to issue a certification is based." 20 C.F.R. § 602.10(f) (1977). The growers then submitted H-2 petitions to the INS without a USDOL certification, as contemplated by INS regulations. 8 C.F.R. § 214.2(h)(3) (1977). The INS ultimately approved the growers' H-2 petitions despite the fact that the USDOL had refused to certify the growers' needs to hire temporary foreign workers. In approving the petitions, the INS stated that USDOL's certification decision was merely "advisory," the lack of housing was not material since the Mexican workers resided within daily commuting distance, the growers had established that there were not sufficient domestic workers available, and the failure to approve the petitions would result in economic devastation for the Presidio Valley. At virtually every stage of the administrative proceedings, officials of the USDOL and INS cited the lack of housing as the sole impediment to approval of the growers' petitions. At no time was the absence of a ¾ guarantee cited as a reason for denying certification.

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[17] Appendix H, at A-66.

Despite the clear record on this point and the fact that the district court had not made any finding on this point, the court of appeals engaged in its own fact finding and concluded that lack of housing was only one of the reasons for refusing to certify the petitions.[18] This Court has held that "[f]act finding is the basic responsibility of the district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n. (1974); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

No matter how many ways the USDOL may have *thought* the growers' petitions to be deficient, the fact is that the USDOL only cited the lack of housing as the reason for denying certification and never once cited the lack of a ¾ guarantee as a reason for denying certification. The court of appeals' determination that the growers were obligated to provide a ¾ guarantee despite the fact that the USDOL never cited the absence of a ¾ guarantee as a reason for denying certification violates numerous principles of administrative law. First, an agency is bound by its own regulations. *United States v. Nixon*, 418 U.S. 683 (1974). The USDOL's certification regulations clearly stated that, if the USDOL determined that it could not issue a certification, its notification to the employer "shall contain a statement of the reasons on which refusal to issue a certification is based." 20 C.F.R. § 602.10(f) (1977). The USDOL at no time cited the absence of ¾ guarantee as a reason for denying certification. Secondly, it is a "venerable principle of administrative law" that an agency must set forth clearly the grounds for its decision. *Village of Winnetka, Ill. v. FERC*, 678 F.2d 354, 357 (D.C.Cir. 1982), citing *SEC v. Chenery Corp.*, 318 U.S.

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[18]Appendix F, at A-36 ("DOL refused to certify the petitions, however, primarily on the ground that there was insufficient housing available in the Valley to accommodate migrant workers. DOL also considered the terms of employment offered by PVFA to be insufficient under its regulations . . . .")

80 (1943). Finally, an agency decision must stand or fall on the reasons articulated in the decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 103 S.Ct. 2856, 2870 (1983).

By its actions, the USDOL certainly led the growers and the INS to believe that the lack of housing was the only obstacle to certification. By imposing a requirement that the USDOL had not called to the attention of the growers and the INS, the court of appeals violated numerous principles of administrative law.

III. The Court Of Appeal's Decision To Reopen Sua Sponte The Issue Of Whether Plaintiffs Had Waived Actual Damages Violated Basic Principles Of Appellate Practice Since Plaintiffs Had Repeatedly Waived Actual Damages In The District Court, The District Court Expressly Ruled Plaintiffs Had Waived Actual Damages, Plaintiffs Did Not Challenge This Point On Appeal, And The Court Of Appeals Acknowledged That Plaintiffs Had Waived Actual Damages Below.

The private civil relief provision of FLCRA provided for the award of either actual damages or liquidated damages up to $500 per FLCRA violation. 7 U.S.C. § 2050a(b) (1977). The court of appeals ruled that the question of whether the plaintiffs had waived their actual damages under FLCRA was "a matter for the district court to resolve in the first instance on remand."[19] By reopening an issue that plaintiffs had waived below and had not raised on their appeal, the court of appeals violated numerous principles of appellate practice.[20]

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[19]Appendix F, at A-56 n. 13.

[20]Defendants recognize that this issue may become moot if the district court on remand reaffirms its previous ruling that the plaintiffs had waived actual damages and only awards liquidated damages. Defendants have raised this issue at this time in light of the other issues raised by this petition and since it is not clear whether failure to raise this issue at this time would constitute waiver of the issue.

From the very beginning of the litigation, plaintiffs had sought only liquidated FLCRA damages, an intention they reiterated at virtually every stage of the proceedings. When the defendant growers submitted interrogatories seeking to determine plaintiffs' actual damages, none of the plaintiffs answered the interrogatory, and plaintiffs' counsel stated to the district court that plaintiffs were not pursuing actual damages. The district court expressly ruled that plaintiffs had voluntarily waived any right to actual damages and were seeking liquidated FLCRA damages instead.[21] Plaintiffs did not appeal from this ruling of the district court but merely challenged the *amount* of liquidated damages awarded by the district court. Finally, even the court of appeals acknowledged that "[t]he plaintiffs waived their rights to actual damages and instead sought liquidated damages under the FLCRA . . . ."[22]

The court of appeals' decision, sua sponte, to reopen the issue of whether plaintiffs had waived actual damages does not merely fly in the face of plaintiffs' repeated assertions that they had waived such damages, but it also violates several principles of appellate practice. First, it has been held numerous times that issues not raised below cannot be raised on appeal. *See, e.g. United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("In exceptional cases, especially in criminal matters, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken . . . ."). *See also Wiley v. Offshore Painting Contractors, Inc.*, 711 F.2d 602 (5th Cir. 1983) (issues raised on appeal but not presented to trial court were considered "frivolous" and would not be considered). This principle would apply with stronger force in this case where plaintiffs expressly waived any right they had to actual FLCRA damages and expressly elected to seek liquidated FLCRA damages. Secondly, it has been held numerous times that an appellant's brief abandons all points not mentioned

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[21]Appendix C, at A-14.

[22]Appendix F, at A-39.

therein. *See, e.g., Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1539 n. 14 (5th Cir. 1984). The plaintiffs did not challenge the district court's ruling that they had expressly waived actual damages. Instead, plaintiffs contended on appeal that the district court had abused its discretion in setting liquidated damages, a point which the court of appeals ruled against them.[23]

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 18, 1985

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[23]Appendix F, at A-51-52.

APPENDIX A

Order Of February 2, 1982 Of The United States District Court For The Western District Of Texas, Pecos Division, Denying Defendants' Motion For Summary Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-81-CA-24

ADELAIDO PRIMERO, *et al.*

v.

PRESIDIO VALLEY FARMERS ASSN., *et al.*

ORDER

On this date came on to be considered Defendant's Motion for Summary Judgment, and the Court, having carefully considered said motion is of the opinion that the following Order should issue:

It is Ordered that Defendant's motion as regards its claim of exemption under 7 U.S.C. setion 2042 (b)(5), be, in all respects Denied. Defendants have produced no evidence that an arrangement with the government of Mexico exists which would provide for written contracts for the Plaintiffs, and that such contracts are enforced through the United States by an instrumentailty of the Mexican government.

It is Ordered that Defendant's motion as regards the lack of intentional violations of the FLCRA be, in all respects, Denied. The Court finds that "intentionally", as used in 7 U.S.C. section 2050a(b), refers to the common civil standard which holds a person liable for the natural consequences of his or her acts. *Stewart v. James*, 519 F.Supp. 315 (E.D. N.Y. 1981); *DeLeon v. Ramirez*, 465 F.Supp. 698 (S.D. N.Y. 1979).

It is Ordered that Defendant's motion as regards the issue of limitations be, in all respects, Denied. The Court finds

that the two year limitation period of Tex.Rev.Civ.Stat.Art. 5526 had not vested with respect to claims after August 27, 1977, and that therefore, such claims received the benefit of the extension of Article 5527 (extending the limitation period for debts to four years). The Court finds that the filing of the *Lara-Vargas* action in the El Paso Division does not toll the two year limitation period for purported class members under authority of *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). Accordingly, only the claims which were viable after the date of August 27, 1977, are cognizable in this action. Counsel for all parties are directed to examine their records and prepare for trial with this directive in mind.

This Court would request counsel to forward recommendations to the Court with regard to a streamlined method of litigating this cause. Obviously, it would be neither possible nor desirable to require each of the 251 plaintiffs to testify.

Signed and Entered this the 30th day of January, 1982.

LUCIUS D. BUNTON
United States District Judge

APPENDIX B

Memorandum Opinion And Order Of January 24, 1983 Of The United States District Court For The Western District Of Texas, Pecos Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-81-CA-23

AMADO SALAZAR, *et al.*

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

MEMORANDUM OPINION AND ORDER

Came on for consideration this date the parties' Cross Motions for Summary Judgment, and the Court, having heard argument thereon, and having carefully considered the proofs relating thereto, in connection with the relevant authorities, issues the following Memorandum Opinion and Order.

1. *Facts*

The long and tortuous procedural history of this case dates back to the year of our Lord, 1977, and the situs of all relevant events is the Presidio Valley of Southwest Texas. In 1977, due to various factors, a group of Presidio Valley farmers banded together to form the PRESIDIO VALLEY FARMERS ASSOCIATION (hereafter PVFA). Each member of the PVFA paid dues to the organization. In the spring of 1977, the PVFA petitioned the United States Immigration & Naturalization Service for permission to import approximately 800 Mexican nationals, under the U.S. Government's H-2 visa program, for the purpose of agricultural field work. Permission was granted by the Immigration & Naturalization Service (hereafter INS) for importation, and the field work

was accomplished between June 9, 1977, and April 30, 1978. Multiple lawsuits have arisen out of these facts, and this Court has attempted to consolidate all similar actions arising from such facts, with the idea of rendering consistent, manageable findings. It is against this basic framework that the litigation proceeds.

2. *Farm Labor Contractor*

The parties disagree as to whether or not the PVFA was a "farm labor contractor", as defined at 7 U.S.C. § 2042(b) (Supp. 1982). The central issue is whether the PVFA:

(a) recruited solicited, hired, furnished, or transported,

(b) for a fee,

(c) migrant workers,

(d) for agricultural employment.

A finding that the PVFA acted as a farm labor contractor would necessarily entail the judicial review of its operations pursuant to the guidance of 7 U.S.C. § 2043 and § 2045 (Supp. 1982). This Court is assisted in its review of the question by the seminal case of *Soliz v. Plunkett*, 615 F.2d 272 (5th Cir. 1980), wherein it is made clear that the Farm Labor Contractor Registration Act (hereafter FLCRA) is intended to apply to "middlemen", who make arrangements between farmers and migrant workers. There, it is also mandated that the remedial purpose of the FLCRA be heeded, and that the FLCRA terms should be given their ordinary meaning. The Court in *Soliz, supra*, undertook a careful review of that factual situation, tempered with the legislative reasoning of the Act. *See also, Alvarez v. Joan of Arc, Inc.*, 658 F.2nd 1217 (7th Cir. 1981).

In the instant case, the Defendants first argue that the PVFA was not acting as a middleman to recruit, solicit, hire, furnish or transport the agricultural workers, and second, argue that, in any event, they come within certain exceptions to the definition of farm labor contractor, codified at 7 U.S.C. § 2042 (b)(2) and/or (3)(Supp. 1982).

The Articles of Incorporation of the PVFA stated that its purpose was to "contract for and obtain migrant labor for the use of its members." The PVFA solicited workers through newspaper and radio advertisements and filed clearance orders for agricultural jobs with the Texas Employment Commission. The PVFA petitioned the INS for permission to bring the workers who were Mexican nationals into the United States under the auspices of the H-2 visa program. These activities, in the opinion of the Court, form a sufficient basis upon which to make a finding that the PVFA acted as a farm labor contractor in recruiting, soliciting, hiring and/or furnishing the Plaintiff workers to area farms.

The Defendant members of PVFA admit that they paid the Association the dues with which it performed its services. This action has been held sufficient to satisfy the "fee" requirement of the FLCRA. *Usery v. Coastal Growers Assn.*, 418 F.Supp. 99 (C.D. Cal. 1976), *affd.*, 498 F.2d 521 (9th Cir. 1979).

The Defendants do not contend that the persons recruited, solicited, hired and/or furnished were not migrant workers for agricultural employment.

The Defendants argue that their actions clearly come within two exceptions to the definition of farm labor contractor, which exceptions are set forth at 7 U.S.C. § 2042(b)(2) and (3)(Supp. 1982). This is a troublesome point. The first exception to the definition of a farm labor contractor applies if the farmer engaged in contracting activity solely for his own operation. In this case, the Court has found that the Association performed functions meeting the definition of a farm labor contractor. The Defendants do not, and cannot, argue that each individual association member acted only in his own behalf, choosing workers only for his own operation. It is obvious that the PVFA acted for the joint benefit of its constituent members. The individual farmers did not set their own terms of work or recruit and hire the migrant workers individually. Instead, they relied on the PVFA to meet these needs. Again, it is apparent that the individual growers relied on the PVFA to act as their middleman

between the growers and the pickers. The individual PVFA members who hired certain migrant workers acted not for their individual benefit, but rather, for the benefit of the Association.

Accordingly, the Court finds that the Defendants were not "personally engaging in such activity for the purpose of supplying migrant workers solely for his own operation." 7 U.S.C. § 2042(b)(2)(Supp. 1982); *Soliz v. Plunkett, supra.* Likewise, this Court finds that the exception set forth in 7 U.S.C. § 2042(b)(3)(Supp. 1982) is not applicable to the case at bar. There is no proof that the activities previously referred to were engaged in solely for the employer on no more than an incidental basis.

Therefore, the Court finds that the Defendant PVFA was acting as a "farm labor contractor", as defined at 7 U.S.C. § 2042(b)(Supp. 1982), subject to the rights and responsibilities required by the FLCRA.

3. *Adverse Effect Wage Rate*

The Plaintiffs argue that they were entitled to an adverse effect wage rate of $2.83/hour during their employment under H-2 visas. By this mechanism, the Department of Labor sets the minimum wages which must be agreed to by the agricultural employers before the temporary foreign labor is certified to work in the United States. *See Snapp v. Puerto Rico*, _____ U.S. _____, 50 U.S.L.W. 5035 (1982); *Florida Sugar Cane League v. Usery*, 531 F.2d 299 (5th Cir. 1976); 10 C.F.R. § 602.10. The main purpose of the adverse effect wage rate is to protect domestic workers from an influx of foreign workers who would work at a depressed wage scale. The Court finds that an adverse effect wage rate of $2.83/hour was not required to be paid to the Plaintiffs for their work in 1977. It is apparent that no such published rate existed for Texas in 1977, irrespective of the "policy" of the Department of Labor (as testified to by Grover Sanders). The Department of Labor policy of requiring such rates in locales where they have not been published in the Federal Register, clearly conflicts with the Department's

regulation that sets adverse effect wage rates, except as otherwise provided, as "the prevailing wage rates in the area of intended employment." 20 C.F.R. § 655.207(a). It is well settled that an agency is bound by its own regulations. *U.S. v. Nixon*, 418 U.S. 683 (1974). The Court also finds that the INS, through Acting Commissioner Noto, waived any requirement of an adverse effect wage rate being a prerequisite for the issuance of H-2 visas to the migrant workers.

4. *Other Terms and Conditions of Employment under 20 C.F.R. § 602.10a* (1977)*

The Plaintiffs argue that other conditions of employment set forth in 20 C.F.R. § 602.10a (1977), were required to be complied with by the Defendants, and that the Defendants had actual knowledge of this fact. These regulations provide for certain terms and conditions of employment for the temporary migrant workers, ostensibly in an attempt to avoid depressive working conditions for domestic workers and improve conditions for foreign workers.

The Defendants, in response, argue that the terms of 20 C.F.R. § 602.10a (1977) relate only to the certification of temporary foreign labor for agricultural employment, and that the INS is free to approve a nonimmigrant visa petition without such certification. They argue that the issuance of the H-2 visas to Plaintiffs was an implied waiver of the requisites of 20 C.F.R. § 602.10a (1977). Additionally, they argue that they never offered to comply with the terms and conditions of the regulation. This Court finds that the fact that the § 602.10a terms and conditions were never offered to the Plaintiffs by the Defendants is of little consequence. What the growers chose to offer the pickers is not to be construed as an absolute measure of what the pickers were entitled to under the laws of the United States. Additionally, the Court finds, as did the Honorable James DeAnda in *Montelongo v. Bell*, B-77-167 (S.D. Tex., Sept. 16, 1982) that, "Even though the petitions were approved without Depart-

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*Presently located in substantial part at 20 C.F.R. § 655.202 (1982).

ment of Labor certification, the Department of Labor regulations should not have become irrelevant." Accordingly, this Court will examine the actions of the Defendants, giving due regard of the prevailing economic situation in the Presidio Valley in 1977, as well as the historical exploitation of migrant labor. *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969).

(a) *Days of work*—Plaintiffs argue that they should have been guaranteed payment for three-fourths of the work days during the contract period, which the Plaintiffs argue is the visa period. The visa period for 148 workers was from June 9, 1977, to April 30, 1978, and for 661 of the workers the visa period was June 9, 1977, to December 1, 1977. The Defendants, in response, argue that the emergency situation existing in 1977, as well as the unconscionable effect that the imposition of a three-fourths work guarantee would produce, mandate that the requirement not be imposed under the instant facts. This Court agrees. The prevailing emergency economic situation was well described in the INS Order of June 9, 1977, which approved the H-2 petitions. It is obvious that, had the petitions not been expediently approved, the entire crop of the Presidio Valley farms would have been destroyed. Additionally, it must be noted that the great majority of the pickers resided in Ojinaga, Mexico, which is directly across the Rio Grande from Presidio, Texas. They resided at their residences and traveled a short distance to the fields to work each day. This work did not exist in Mexico. The nature of the Presidio Valley crops must also be considered. The harvest season for cantalopes is from June 15 to the end of July, onions from May 1 to the end of June, chile and bell peppers from late July to mid-November, and cotton from late September through early December. It is abundantly clear that each of the workers could not be employed for a full three-fourths of the entire visa period. To so require would force the Defendant farmers to pay for work for which they had no requirement, and quite possibly force them into liquidation. The tremendous amount of bureaucratic red tape inherent in the approval of the H-2

visa petitions dictated that the visa period extend throughout the entire harvest season for the variety of crops. To require a separate visa petition for each crop, for the sole purpose of meeting the three-fourths work guarantee, would be nonsensical and serve no useful purpose. Accordingly, the Court finds that the three-fourths work guarantee should not be imposed under the facts of the instant case.

(b) *Transportation expenses*—The Defendants have moved for Summary Judgment that they were not required to pay $5.00 per week transportation costs to the Plaintiffs. The Plaintiffs respond, arguing that local workers were in fact entitled to the $5.00 fee, and, in any event, the INS imposed the requirement on its own accord. This Court disagrees with Plaintiffs' interpretation of "on-the-job site living quarters" being the equivalent of "their local living place." The evidence in this case establishes that "on-the-job site living quarters" were not provided for the pickers, and that this was a principal reason that the Department of Labor denied certification. The evidence also establishes that the majority of the Plaintiffs were residents of Ojinaga, Mexico, who needed to travel only a short distance to the fields. Additionally, it is noted that there is no evidence that the INS intended to impose a transportation fee to be paid to those workers who lived only a short commuting distance from the work site. Accordingly, it is ORDERED that Defendants' Motion for Summary Judgment on the issue of transportation costs be GRANTED. It is argued by Plaintiffs that the Defendants charged each of them $3.00 per week for transportation costs. This will not be permitted, and if true, offends the Court's sense of justice. The Court will hear evidence on this aspect at the damages phase of the trial.

(c) *Other guarantees*—The Court finds that it would be just and reasonable for the Defendants to have complied with certain other terms and conditions set forth at 20 C.F.R. § 602.10a (1977). Such compliance would drastically improve the safety and working conditions of the pickers at a minimal inconvenience and cost to the growers. Accordingly, the

Court finds that the following terms and conditions of employment should have been met during the term of employment of the Plaintiffs:

(1) a work contract,

(2) insurance,

(3) free tools,

(4) accurate wage records and receipts.

The Court finds that the considerations that excused compliance with the three-fourths work guarantee and transportation cost requirement are not present to excuse compliance with the above-stated requirements.

4. *Who Employed the Plaintiffs?*

Last, but not least, the parties disagree as to who was the employer of the Plaintiffs. The Plaintiffs argue that the individual farmers and the PVFA were joint employers of the H-2 workers, and that, therefore, each of the members of the PVFA is derivatively liable for any violation of the law. The Defendants argue that the PVFA was at no time the employer or joint employer of the Plaintiffs. As evidence, the Plaintiffs argue that that H-2 visa petitions were filed by the PVFA, listed the PVFA as employer. They also argue that the PVFA, as employer, freely shared the workers among its members. This Court finds that the representations and actions of the PVFA render it liable as a joint employer of the Plaintiffs.

For the reasons set forth herein, IT IS ORDERED that Plaintiffs' Motion for Summary Judgment be GRANTED on the issues of (a) FLCRA, (b) requisite compliance with certain terms and conditions of employment, set forth in 20 U.S.C. § 602.10a (1977) and (c) that the PVFA was a joint employer of the Plaintiffs.

IT IS ORDERED that Defendants' Motion for Summary Judgment be GRANTED on the issues of: (a) adverse effect wage rate and (b) transporation costs.

All relief not granted herein is DENIED.
SIGNED and ENTERED this 24th day of January, 1983.

LUCIUS D. BUNTON
United States District Judge

APPENDIX C

Memorandum Opinion And Order Of February 6, 1984 Of The United States District Court For The Western District Of Texas, Pecos Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-81-CA-23

AMADO SALAZAR, *et al.*

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

MEMORANDUM OPINION AND ORDER

On this date came on to be considered the unresolved matter of liquidated damages to be recovered by Plaintiffs in this action for Defendants' violations of 7 U.S.C. § § 2041 *et. seq.*, the Farm Labor Contractor Registration Act (FLCRA), and this Court, after fully considering the volumes of written pleadings filed by the parties in this action, the controlling legal authorities, and the evidence presented to this Court, both at a hearing held during the week of September 22, 1983, and the proof offered in support of the parties' Motions for Summary Judgment, enters the following Memorandum Opinion and Order as to the amount to be recovered by Plaintiffs in this action.[1]

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[1]Because of the unique nature of this cause, the parties generally agreed to present their respective cases by the presentation of "select" witnesses. In an attempt to avoid calling more than four hundred witnesses, the vast majority of whom are not citizens of this Country, the parties called representative witnesses who established the basic surrounding facts of this action. The parties then filed cross motions for summary judgment and provided the Court with extensive proof in support thereof.

I.

In this Memorandum Opinion and Order, this Court will set out only the facts that are necessary for the resolution of the award of liquidated money damages. To more fully understand the factual basis upon which this money award rests, the reader's attention is directed to this Court's Order of January 24, 1983, in which Defendants' joint and several liability for their collective violations of 7 U.S.C. § § 2041, *et. seq.*, was established.

(A) *The Act & Damages*

The Farm Labor Contractor Registration Act, 7 U.S.C. § § 2041, *et seq.*, was enacted by Congress in 1963 to correct abuses "by certain irresponsible [persons who contract] for the services of the migrant agricultural laborers [and] who exploit producers of agricultural products, migrant agricultural laborers and the public generally." *Id.* § 2041(a). Such legislation, as it is with all modern Congressional action, was enacted to remove any "impediments, obstructions, and restraints occasioned to the flow of interstate commerce by [such] activities." *Id.* § 2041(b).

In essence, the Act and regulations promulgated thereunder mandate that "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers at any one time in any calendar year for interstate agricultural employment," *Id.* § 2042(b), must:

(1) register as a farm labor contractor:

(2) fully disclose to each worker at the time of his hiring:

(a) the area of his or her employment;

(b) the crops he or she is hired to labor upon;

(c) the transportation, housing, and insurance to be furnished to the laborer;

(d) the wage rate to be paid; and,

(e) the charges of fees to be deducted by the farm labor contractor from the laborers' wages for his or her services;

(3) conspicuously post a written statement of the terms and conditions of that employment;

(4) keep adequate and complete records of all wages paid to the laborers and fairly itemize all deductions legally withheld from those wages; and

(5) provide free tools for the laborers' use.

Id. § 2045.

Since this Court has previously held that Defendants have failed to comply with the above-recited duties imposed by federal law, the relevant inquiry is now focused upon the sanctions available to the Court in resolving this cause. As such, this Court turns to § 2050a(b) which mandates that:

> If the Court finds that the [Defendants] have intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation.

Accordingly, this Court must now establish a fair and just amount for each violation of the Act and award such sum to each Plaintiff who suffered from such a violation. Since Plaintiffs have voluntarily chosen to proceed to recover their money damages in the form of a liquidated amount fixed by this Court, thus waiving any right to a sum of actual damages, this Court must establish a discretionary amount which will best serve the purpose of the Act. This Court need not apportion the damages among the various Defendants since in this Court's prior Order establishing liability for their violations of the Act, the Defendants liability was affixed as joint and several under the law of the State of Texas.

(B) *Considerations in Determining Damages*

Although this Court is given the discretionary authority in § 2050a(b) to establish the amount of such liquidated damages in a fair and just amount, it is undoubtedly wiser to set out in a brief fashion the reasons and basis of such discretionary action.

(i) *The Controlling Law, the Farm Labor Contractor Registration Act, has been repealed by Congress*

Initially this Court is mindful of the startling fact that the law under which the Defendants stand liable has been repealed by Congress and replaced by legislation which, if in effect at the time of the actions, the basis of this cause, would now most likely exempt Defendants from its grasp and exclude Plaintiffs from its protection.[2]

On January 14, 1983, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § § 1801-1872. This new law, MASAWPA, which repeals the law under which Defendants stand liable, FLCRA, expressly excludes such "an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association" from its effect. *Id.* § 1802(7). As such, Defendants, if sued under the present law arguably would not be liable to the Plaintiffs for the damages sought in this action.[3].

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[2]On or about September 1, 1982, the Secretary of Labor transmitted a bill entitled "the Migrant and Seasonal Agricultural Worker Protection Act." The House Subcommittee on Labor Standards held a hearing on the bill, H.R. 7102, on September 14, 1982. The Committee on Education and Labor reported out the bill from committee unanimously on September 28, 1982, H. Rep. No. 97-885, reprinted at 1982 U.S. Cong. Adm. News 4547. The House passed the bill on September 29, 1982. 128 Cong. Rec. H7907 (Sept. 29, 1982). The Senate unanimously passed the bill on December 19, 1982, with the minor change of the effective date of the legislation. 128 Cong. Rec. § 15568 (Dec. 19, 1982). The House agreed to such a change. 128 Cong. Rec. H10456 (Dec. 20, 1982).

[3]It is clear that before the enacting of MASAWPA the general rule was that not-for-profit agricultural organizations such as Defendant PRESIDIO VALLEY FARMERS ASSOCIATION was bound by the dictates of FLCRA. *See Marshall v. Coastal Growers Association*, 598 F.2d 521 (9th Cir. 1979), in which the Ninth Circuit found:

> Those who have created a corporation as an advantageous means of serving their business interests cannot then disregard that corporate entity in order to avoid statutory obligations formulated for the public's protection. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

In viewing the new law, the Court also finds that Plaintiffs themselves are excluded from coverage under MASAWPA by the provisions of 29 U.S.C. § 1802(6), (8)(B)(iii), (10)(B)(iii) which excludes "any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under § § 1101(a)(15)(H)(ii) [H-2 workers] and 1184 of Title 8." It is undisputed that Plaintiffs are "temporary nonimmigrant aliens" admitted into this country as H-2 workers. As such, it is only rudimentary to state that they would be excluded under the operation of MASAWPA.[4]

The Court then continued to find that such an agricultural association was in fact a farm labor contractor and liable under the Act. *See Soliz v. Plunkett*, 615 F.2d 272 (5th Cir. 1980).

It is also clear that Defendants bear the burden of establishing their entitlement to any exemption or exclusion of their agricultural association from the terms and conditions of FLCRA. Since the Act is remedial, any exemption or exclusion is to be construed narrowly and Defendants bear the burden of establishing that their activities are "plainly and unmistakenly within the terms and spirit" of any exemption or exclusion claimed in the action. *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 234 (7th Cir. 1983); *Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152, 1154 (9th Cir. 1983); *Soliz v. Plunkett, supra*, 615 F.2d at 272 (5th Cir. 1980); *Marshall v. Coastal Growers Association*, 598 F.2d 521 (9th Cir. 1979).

[4]An examination of the hearing record before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 97th Cong., 2d Sess. (Sept. 14, 1982), at 52, reveals that the Representative of the Department of Labor, believing that Plaintiffs were exluded from the protection of FLCRA, stated that

> the exemption which is currently in FLCRA pertaining to H-2's [nonimmigrant alien laborers such as Plaintiffs] and the exemption which is carried over into MASAWPA concerning H-2's provides no exemption for anyone except the individual who has come into the country legally under the H-2 program.

A further examination of the House Committee on Education and Labor's Report reveals that not only did Congress believe that it had continued to exclude nonimmigrant foreign laborers from the workings of MASAWPA as it erroneously believed that it had done under FLCRA, H. Rep. No. 97-885, reprinted at 1982 U.S. Code Cong. Adm. News, at 4554, but also that it had intentionally exempted such agricultural ventures such as

A further review of the Congressional intent shows that Congress enacted into law in MASAWPA what it believed was the actual purpose and intent of FLCRA—the curing of abuses in the agricultural market. It is very revealing to find that Congress has recently chosen to narrow the focus of the law and exclude the parties to this action from that remedial legislation.[5]

(ii) *The Substantive Impact upon Each Plaintiff*

Since the primary goal of this Court in this action is to fairly and justly resolve this dispute, and in so doing award Plaintiffs an amount of money damages which "fairly and equitably compensate the workers for Defendants' actions . . . [without being] excessive," *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 240 (7th Cir. 1983), this Court must determine the substantive impact upon each Plaintiff caused by each violation. This is not meant in any way to limit the amount of the awarded liquidated damages to the amount of actual damages suffered by Plaintiffs, *Castillo v. Givens*, 704 F.2d 181, 197 n. 37 (5th Cir. 1983), *citing with approval, Alvarez v. Joan of Arc*, 658 F.2d 1217, 1224 (7th Cir. 1981)(no need to prove actual damages to obtain liquidated damages); *see also Espinoza v. Stokley-Van Camp, Inc.* 641 F.2d 535, 538-39 (7th Cir., 1981)(authority therein, but modified by later holding in *Alvarez v. Joan of Arc, supra*), but instead to insure that Plaintiffs receive an amount which is not harshly and unrealistically based upon technical non-compliance. *See Alvarez v. Longboy*, 697 F.2d 1333, 1341

Defendants' association from the workings of the new law because of unwanted ramifications caused by Congress' previous failure to so exempt them from the workings of FLCRA. Id. at 4549. Especially revealing is the Chairman of the Senate Labor Committee's speech made on the floor of the Senate shortly before its unanimous passage. 128 Cong. Rec. S15561 (Dec. 19, 1982).

[5]This Court must also note that it is fully aware of the impact of 1 U.S.C. § 109 on this action and its mandate that the repeal of FLCRA should have no impact on the bringing of this action. This Court only views MASAWPA to fully determine the actual legislative intent and purpose to be served in this action.

(9th Cir. 1983)(Court may deny any award of damages if Defendants' actions were accidental, innocent, or merely negligent . . . damages are mandated only when actions are irresponsible and they "exploit producers of agricultural products, migrant agricultural laborers, and the public generally"—7 U.S.C. § 2041).

(iii) *Was the Violation Intentional or Inadvertant?*

Since this Court may award liquidated damages only for intentional violations of the Act, this Court must determine whether the violations were "conscious or deliberate." However, no proof need be offered of any specific intent to ignore and violate the Act, Plaintiffs need only show that the violations were the natural and foreseeable consequence of their intentional acts. *Castillo v. Givens, supra*, 704 F.2d at 197; *Alvarez v. Longboy*, 697 F.2d 1333, 1341 (9th Cir. 1983); *Alvarez v. Joan of Arc, supra*, 658 F.2d at 1224.

(iv) *The Impact upon the Public Interest*

Section 2041(a) directs this Court that the remedial purpose of the Act is to protect the interest of the general public from the abuses suffered by it at the hands of "irresponsible" persons trading in the marketplace of agriculture labor. Since this Court does not operate in an academic vacuum separated from the causal impact of its decisions, this Court must recognize the actual impact upon the public interest of not only Defendants' intentional violations of federal law, but also the impact on the general interest of the amounts awarded as liquidated damages.

II.

Having set forth this Court's general considerations in awarding liquidated money damages to Plaintiffs for Defendants' violations of federal statute and regulations promulgated thereunder, this Court must now consider each violation and establish a dollar amount to be awarded for each violation. For clarity, the statutory violations are set forth below and discussed separately in light of the con-

siderations expressed previously within this opinion. The violations are:

(1) Defendants' failure to register as a Farm Labor contractor;

(2) Defendants' failure to provide a work contract to each Plaintiff;

(3) Defendants' failure to post the conditions of employment;

(4) Defendants' failure to keep complete and adequate wage records; and

(5) Defendants' failure to comply with the conditions of the work agreement.

For the purpose of this Memorandum Opinion and Order, Defendants' various violations have been grouped into two sections labeled Technical Violations and Substantive Violations. This Court must stress that it does not wish to minimize Defendants' actions by labeling some of those actions as Technical Violations; however, in order to set forth this complex and convoluted set of facts in a reasonably comprehensible fashion, this Court employs this device with the hope that no person will employ semantic sport to thwart the clear intent of this Court.

(A) *Technical Violations*

(i) *Failure to Register*

This Court is mindful that the statutory requirement of registration serves a most useful purpose since to know those bound by the law is certainly to some extent control over those so bound. However, since such admitted failure had little real impact upon either the Plaintiffs or the general public in this action, this Court believes such failure amounts to little more than a technical noncompliance with a law which has been subsequently changed and modified to most likely exclude such actions from this forum.

Although this Court in no manner condones Defendants' failure to comply with a law they claim they had no knowledge

of, this Court is aware of the realities of the situation. Accordingly, the sum of Fifteen Dollars ($15) is established as the amount of liquidated money damages assessed for each violation as to each Plaintiff for Defendants' failure to register as a farm labor contractor.

(ii) *Failure to Provide a Work Contract & Failure to Post Work Conditions*

Even a cursory examination of this cause reveals that Plaintiffs suffered not from Defendants' denial or failure in providing them with a tangible expression of their work agreement, but from Defendants' failure to comply with the agreed terms of such an agreement. The mere posting of such an agreement or the providing of each Plaintiff with such an agreement would patently serve little, if any, purpose in forcing Defendants to obey the terms of the work agreement with Plaintiffs. Of all Defendants' sins, these must rank as the least.

Accordingly, the sum of Fifteen Dollars ($15) is assessed for each of their failures to (1) post the conditions of the employment and (2) provide each Plaintiff with a copy of the work agreement.

(iii) *Failure to Keep Adequate Wage Records & Failure to Provide Wage Receipts*

The harsh impact suffered by Plaintiffs because of Defendants' intentional violations of FLCRA does not stem from Defendants' extremely amateurish and implicitly fraudulent accounting practices, but from Defendants' failure to comply with the actual terms of the work agreement. Although more adequate and complete bookkeeping practices were certainly envisioned by Congress, Defendants' compliance with the law would have provided Plaintiffs with little more than a written record of their unfortunate plight. As such, the sum of Fifteen Dollars ($15) is assessed as liquidated damages for each of Defendants' violations of (1) failing to keep adequate records of Plaintiffs' wages, and (2) failing to provide Plaintiffs with itemized wage receipts.

See Rivera v. Adams Packing Ass'n., Inc., 707 F.2d 1278 (11th Cir. 1983)(duty to keep "facially" accurate wage records is demanded by FLCRA).

(B) *Substantive Violations*

The focal point of Defendants' illegal actions is their general disregard for the terms and conditions of their employment contract with Plaintiffs. These violations, being quite distinct from the other abstract technical violations, directly affect the quality—or lack of quality—of Plaintiffs' work life. These violations are:

(1) Defendants' failure to pay Plaintiffs a minimum wage;

(2) Defendants' failure to provide free tools; and

(3) Defendants' making illegal payroll deductions from Plaintiffs' wages.

It is inherent in our system that a laborer be paid a just and fair wage for his or her toil. This is even more compelling when that minimum wage, established by law, is an inducement for the laborer to assume the responsibilities and liabilities of that employment. It seems only reasonable to state further that this general principle has two applicable corollaries in this action. They are that no illegal and unnecessary deductions be made from a worker's wages and that a worker may not be made to pay for the equipment he or she employs in performing the contracted labor for his or her employer.

The evidence presented in this cause shows an intentional pattern and practice by the Defendants in failing to provide piece rate laborers with the required minimum wages due them, in making illegal payroll deductions, and in charging Plaintiffs for tools used in their labor. All these things were done in violation of federal statute and regulation.

The evidence presented additionally reveals that many laborers earned less than one dollar an hour for their onerous, back-breaking labor as piece rate laborers, while at the same time being illegally charged "top dollar" for tools used in

their labor, and being underpaid by Defendants' illegally withholding money from their meager paychecks.

No excuse can be made, nor any mitigation be countenanced as to these violations. As such, the sum of Three Hundred Dollars ($300) is assessed against Defendants for each Plaintiff who labored as a piece rate worker at any time during the growing season in issue in this cause.[6]

(C) *Damages*

Accordingly, the following amounts are awarded as liquidated damages as to each violation suffered by the Plaintiffs. The actual application of these damages as to each party to this action is set forth in the Findings & Conclusions listed in Appendix "A" of this Memorandum Opinion and Order. The damages awarded are:

VIOLATION	*AMOUNT AWARDED PER VIOLATION*
Failure to register as a farm labor contractor	$ 15.00
Failure to provide a work contract to each Plaintiff	15.00
Failure to post the employment conditions	15.00
Failure to keep wage records	15.00
Failure to provide wage receipts	15.00
Failure to comply with terms of employment	300.00
TOTAL	$375.00

[6]Defendants' violations bring to this Court's mind the biblical admonition that:

> Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates: At his day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth

III.

This Court must now address the impact of the statute of limitations upon the *Zuniga* group of intervenors and determine which members of the *Zuniga* group of intervenors are barred from recovering money damages in this action. In order to do so, this Court will set forth the relevant facts and applicable law.

(A) *The Facts*

In the spring of 1977, Defendant PRESIDIO VALLEY FARMS ASSOCIATION successfully petitioned the Immigration and Naturalization Service in order to obtain 809 H-2 visas for nonimmigrant Mexican national farmworkers its members intended to employ on their respective farms. Throughout that growing season the various violations of FLCRA which are the subject matter of this action occurred.

On April 27, 1979, six Plaintiffs filed an action styled *Meliquiares LARA Vargas v. Presidio Valley Farmers Association*, EP-79-CA-85, in El Paso, Texas, in which the six named Plaintiffs wished to represent a class comprised of the 809 H-2 workers who had received the 1977 visas. In this action, the LARA Plaintiffs sought to recover for, among other things, Defendants' violations of FLCRA.

On March 21, 1981, the motion for the certification of the *LARA* class was denied by the Honorable Harry Lee Hudspeth in El Paso, Texas. Within one month, several hundred members of the *LARA* prospective class filed two separate actions in this Court styled *Adelaido PRIMERO, et al. v. Presidio Valley Farmers Association, et al.*, P-81-CA-23, and *Amado SALAZAR Calderon v. Presidio Valley Farmers Association*, P-81-CA-23, complaining of Defendants' actions during the 1977 growing season. As in *LARA*, the *PRIMERO* and the *SALAZAR* Plaintiffs attempted to bring a class action against Defendants.

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his heart upon it; lest he cry against thee unto the Lord, and it be sin unto thee. *Deuteronomy* 24:14-15.

On February 1, 1982, this Court denied the certification of the *PRIMERO* and the *SALAZAR* classes. On this date, this Court also consolidated those causes. A little more than one month later, the *LARA* cause was transferred from the El Paso Division to this Division and consolidated into this cause with the *PRIMERO* and *SALAZAR* actions.

More than one year later, on April 2, 1982, *Esteban ZUNIGA Tarin, et al. v. Presidio Valley Farmers Association, et al.*, P-82-CA-13, was filed in intervention in this cause seeking money damages from Defendants for their violations of FLCRA during the 1977 growing season. This latter group of intervenors and the impact of the statute of limitations upon them are the subjects of this section of the Court's Memorandum Opinion and Order.

(B) *The Controlling Law*

Initially this Court must determine what statute of limitations controls this action. A review of the controlling federal statute reveals that Congress did not affix any statute of limitations to the bringing of an action against a party who had violated the provisions of FLCRA. As such, this Court is guided by the Supreme Court's statement in *Chevron Oil Co. v. Hansen*, 404 U.S. 97, 104 (1971) in which the Supreme Court stated:

> [W]hen a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions. [authority omitted]

See also *Runyan v. McCrary*, 427 U.S. 160, 180 (1976).[7]

After a review of the various Texas statutes of limitations, this Court is of the opinion that Tex. Rev. Civ Stat. Ann. art.

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[7]As the United States Supreme Court stated in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1947):

> The implied absorption of State statute or limitations within the interstices of the federal enactments is a phase of fashioning details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.

5526 § 4 is the "analogous" statute of limitations applicable in this action. *See Hollingsworth v. Cities Service Oil Co.*, 199 S.W.2d 266 (Tex. Civ. App. 1947, writ ref'd n.r.e.), *cert. denied*, 332 U.S. 774 (1947).

This statute of limitations, referred to as "an action for debt when the indebtedness is not evidenced by a contract in writing," stated that such an action "shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward," at the time defendants violated the terms of FLCRA. It would then appear that Plaintiffs were then bound to bring this action within two years of the commission of the FLCRA violations. However, since the Plaintiffs belonged to the prospective class to be certified in the *LARA* action, the statute of limitations was tolled pending the granting or denial of the certification of the class of workers in the *LARA* action. *Crown, Cork, and Seal v. Parker*, _____ U.S. _____, 76 L.Ed.2d 628 (1983); *American Pipe & Construction v. Utah*, 414 U.S. 538 (1944). However, the statute of limitations again began to run against the workers' cause of action on March 21, 1981 when the *LARA* class certification was denied.

In determining the time which ran between March 21, 1981—the date the statute of limitations again began to run—and April 1, 1982—the date the *ZUNIGA* group sought to intervene in this action—this Court finds that three hundred and seventy-seven days out of Plaintiffs' potential seven hundred and thirty days (two-year period of limitations) in which to bring this action expired. In devolving three hundred and fifty-three days (730 days – 377 days = 353 days) back into history from April 27, 1979—the date the *LARA* action was filed and the statute of limitations was tolled—the date May 9, 1978 is discovered.

Accordingly, Plaintiffs may only recover in this action for any of Defendants' actions which violated FLCRA on or after May 9, 1978. Since the proof presented in this action shows that Plaintiffs did not labor after April 30, 1978, the date their H-2 visas expired, they are barred from any

recovery in this action by their untimely filing of their cause of action.

From the record presented in this cause, this Court is unable to fathom why the *ZUNIGA* group of intervenors were so unquestionably lax in bringing their suit in intervention since such group was represented by the same counsel as the *SALAZAR*, *PRIMERO*, and *LARA* Plaintiffs and such group were also members of the original *LARA* prospective class.

Plaintiffs next erroneously contend that they are retroactively entitled to the benefit of the August 27, 1979 amendment to the Texas statute of limitations in which all actions on a debt were placed within the constraints of the four-year statute of limitations, Tex. Rev. Civ. Stat. Ann. art. 5527(1). Such reliance is unwarranted.

Since the first year of the existence of the State of Texas, its Courts have strictly applied the various legislatively enacted statutes of limitations. In *Gautier v. Franklin*, 1 Tex. 732, 740 (1846), Texas' first Supreme Court stated the jurisprudence which still controls this action 138 years later. The Court stated;

> Prescription, by which an end is put at some time to litigation, is founded upon the highest contributions of public policy . . . Such laws should be regarded with favor by courts of justice.

See Jim Walters Home, Inc. v. Smith, 592 S.W.2d 670, 671 (Tex. Civ. App. 1979, writ ref'd n.r.e.).

This Court additionally notes the controlling legal principle stated by the Fifth Circuit in *Doran v. Compton*, 645 F.2d 440, 445-46 (5th Cir. 1981), in passing upon an amended Texas statute of limitations:

> Although the legislature can enact a statute of limitations designed to apply retroactively, a statute of limitations will apply to a pre-existing cause of action only if it was intended to apply retroactively. In accordance with accepted construction, a limitations statute will be presumed to operate prospectively unless its terms

> clearly show a legislative intent that it is to be retroactive. [authorities omitted]

A review of Tex. Rev. Cit. Stat. Ann. art. 5527, as amended, reveals no such legislative intent to have the amended statute of limitations apply retroactively. In fact, such review reveals that the Texas Legislature intended the law to become effective and applicable to accruing causes of action on or after August 27, 1979.

Accordingly, the *ZUNIGA* group of intervenors' action, being controlled by the two-year statute of limitation in effect at the time of Defendants' violations of FLCRA, and this Court's finding that the Texas Legislature undoubtedly did not intend to have the amended statute of limitations apply retroactively so as to extend Plaintiffs' cause of action, is barred by that prescriptive statute. Plaintiffs' dilatory action in seeking such intervention in this cause bars their recovery in this action.

IV.

Because of the unique nature of this cause, unique and arguably unorthodox procedures were mandated to insure the proper resolution of this cause in a fair and just forum. These procedural methods, devised to a great extent by able and imaginative counsel, were employed to provide the numerous Plaintiffs, who are Mexican nationals, a fair, economical, and realistically practical and workable opportunity to present their barely indistinguishable claims in this Country against the Defendants. These procedural methods were also employed to provide the Defendants the greatest opportunity to challenge the claims of the several hundred Plaintiffs without having to bear an unreasonable burden of expense in such proceeding. Of course, always present in this Court's mind in fashioning realistic solutions for unique problems is the requirement that all actions done by this Court be done so with the doctrine of judicial economy foremost in its mind, since to wisely use this Court's time is to insure the availability of this precious resource to others who also require prompt justice. It cannot be stated

too strongly though that this Court's primary focus in any action is the fair and just resolution of the dispute which serves as its basis.

In such light, this Court has determined that Defendants have violated the Farm Labor Contractor Registration Act and that they should pay the liquidated money damages awarded to Plaintiffs for those violations. Because of the complex nature of any cause with more than two hundred Plaintiffs in it, this Court has prepared this Memorandum Opinion and Order in such a way as to best explain this Court's decision and judgment. In so doing, this Court has employed the attached Appendix. It should be considered as express Findings of Fact and Conclusions of Law in this action. The body of this Memorandum Opinion and Order should also be so considered. The Court has employed this approach so that if any reviewing Court is of another opinion as to any controlling principle of law, that Court in its deliberations may render such judgment as it believes is proper in this action.

Based upon the Findings of Fact and Conclusions of Law contained in this Memorandum Opinion and Order, this Court will enter Judgment that Plaintiffs will recover the liquidated sums of money damages awarded and set forth in this Memorandum Opinion and Order.

SIGNED and ENTERED this 3rd day of February, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX D

Judgment Of The United States District Court For The Western District Of Texas, Pecos Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-81-CA-23

AMADO SALAZAR, *et al.*

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiffs recover the sum of FIFTY-THREE THOUSAND SEVEN HUNDRED and no/100 DOLLARS ($53,700) in this action brought pursuant to 7 U.S.C. § § 2041, *et seq.* These sums are awarded to each Plaintiff as set forth in Appendix A of this Court's Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that Defendants pay all costs of court incurred herein, for which execution may issue if not timely paid.

SIGNED and ENTERED this 3rd day of February, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX E

Order Of The United States District Court For The Western District Of Texas, Pecos Division, Amending Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-81-CA-23

AMADO SALAZAR, *et al.*

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

ORDER

On this date came on to be considered Defendants' Motion for Reconsideration of this Court's Judgment of February 6, 1984, and this Court, noting that such Motion is meritorious in part, amends this Court's prior Appendix of its Findings of Fact and Conclusions of Law as set forth in the amended pages of that Appendix attached hereto.

In passing upon Defendants' Motion, this Court feels it must comment and set the record straight as to several assertions made by Defendants' counsel in their Motion. The first assertion, which this Court considers to be patently frivolous, is Defendants' counsel's assertion that "confusion [existed] over the purpose of the hearing [held on October 12-14, 1983, at which time this cause was tried], and as a result counsel for Defendants were not prepared to present an adequate defense at that trial." A review of this cause shows that defense counsel received actual notice from the bench on July 27, 1983 that this cause would be tried during this Court's Pecos, Texas trial week of October 10, 1983. Such trial date was established by this Court in consultation with the attorneys for both sides during a preliminary

injunction hearing held on July 27, 1983. The Clerk of this Court additionally sent formal written notices to counsel on September 26, 1983 setting this cause for trial and docket call on October 10, 1983. In such light, it seems incredulous that Defendants were not apprised sufficient notice "of the purpose of the hearing." Any confusion undoubtedly stems from Defendants' dilatory approach to the resolution of this cause.

The second assertion made by Defendants' counsel is that he never agreed that the discovery conducted in the preparation for the resolution of this cause could be used as summary judgment evidence. Such is simply false. Because of the complex logistic nature of this cause in which several hundred Mexican nationals sought the recovery of statutory damages from, for the most part, Mexican-American growers, the counsel in this cause, with the approval of this Court, fashioned an imaginative device for the efficient resolution of this cause. Since it would have taken more than 50 trial days to hear the various uniform complaints of the Plaintiffs through their translated testimony, such figure being based upon the actual length of time it took to present the testimony of the select witnesses called, the parties joined together at the request of this Court and implemented the procedures employed in this cause. To have one party now condemn such practice because he deplores its consequences strains this Court's patience.

This Court must also note that Defendant contests the size of the awards given to Plaintiffs since such awards "fly in the face of the Court's assumptions underlying its awards of damages." This Court's discretionary award of liquidated damages for the violations it found are entirely reasonable and just. The awards given to the piece rate workers are not based upon the actual damages suffered by Plaintiffs at Defendants' hands, but upon this Court's sense of fairness and justness as set forth and explained within this Court's Findings of Fact and Conclusions of Law. Such is clearly Congress' intent in granting this Court the discretionary authority to make such discretionary liquidated awards.

Having thoroughly reviewed the volumes of pleadings and motions filed in this cause, every such pleading and motion having been carefully considered, this Court enters the following Order.

IT IS, THEREFORE, ORDERED that the Appendix to this Court's previously filed Findings of Fact and Conclusions of Law are amended as set forth in the pages attached hereto. Such amendments merely delete the inadvertant award of $75.00 from two Plaintiffs who are members of the barred class of *ZUNIGA* intervenors. It also lists several additional Findings of Fact as being originally contested factual issues had between the parties resolved by this Court.

IT IS FURTHER ORDERED that these amended pages of this Court's Appendix to the previously entered Findings of Fact and Conclusions of Law are to be inserted in the Original Appendix as if originally placed therein. The pages, having been corrected by the above-recited amendments, are invalid and bear no authority.

IT IS FURTHER ORDERED that all other claims or motions for post-judgment relief in this cause are in all things DENIED.

SIGNED and ENTERED this the 1st day of March, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX F

Opinion Of The United States Court of Appeals For The Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION No. 84-1163

AMADO SALAZAR-CALDERON, *et al.*
Plaintiffs—Appellants—Cross Appellees,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*
Defendants—Appellees—Cross Appellants.

Appeals From The United States District Court For The Western District of Texas

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case presents claims by 492 Mexican nationals against the Presidio Valley Farmers Association and its grower members who employed them during the 1977 harvest season. Plaintiffs allege that defendants violated the terms and conditions of their employment agreement, terms set, for the most part, by federal law, as well as numerous provisions of the Farm Labor Contractor Registration Act.

The plaintiffs prevailed below, but appeal arguing that the district court erred in determining the terms of their employment agreement and in assessing damages. The plaintiffs also ask us to reverse the district court's refusal to certify this case as a class action, and, in the event we also refuse, ask us to reverse its decision that the claims of certain plaintiffs are barred by limitations. Defendants cross appeal, arguing that the district court erred in assessing any liability at all. We find defendants' cross-appeal to be

without merit, but conclude that plaintiffs' challenges demonstrate, at least in part, reversible error. We affirm in part, reverse in part, and remand.

I.

The Presidio Valley of Texas is a small but fertile agricultural region situated along the Rio Grande approximately 200 miles downstream from El Paso and directly across the border from Ojinaga, Chihuahua. Its principal crops include onions, melons, chile peppers and cotton. Illegal aliens from Ojiniga and neighboring Mexico territory have long been the primary source of labor for the Valley's farms.

The circumstances that gave rise to this controversy began in early 1977, when the Immigration and Naturalization Service informed growers in the Valley that it intended to step up its enforcement activity in the area. Aware that the effect of such enforcement would be to cut off labor needed for the 1977 harvest, the growers investigated INS's H-2 visa program. Under H-2, INS may issue visas to aliens for temporary employment in the United States upon petitions of the importing employer. *See* 8 U.S.C. § § 1101(1)(15)(H), 1184(c).[1] We describe first the aspects of the H-2 visa program applicable to the issues before us, and then turn to defendants' use of that program during the 1977 harvest season.

—1—

The regulations implementing INS's authority to issue H-2 visas require applications by the petitioning employer to be accompanied by a certification from the Secretary of Labor

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[1]Section 1184(c) of Title 8 provides:

> The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) . . . of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe . . . .

The Attorney General has delegated to the INS Commissioner the responsibility for granting such petitions. *See* 8 U.S.C. § 1103.

that U.S. workers are not available for the work and that employment of the alien workers will not adversely affect workers in the U.S. *or* a notice stating that such certification cannot be made. 8 C.F.R. 214.2(h)(3). The Department of Labor has in turn set forth minimum standards of employment and procedures that must be followed before it will issue its certifications for H-2 petitions.

In 1977, those regulations were codified at 20 C.F.R. § § 602.10-602.10b; essentially the same regulations are currently codified at 20 C.F.R. § 655.202-207 (1984). Basically, the DOL regulations require an employer seeking certification for alien farmworkers first to attempt to recruit U.S. workers by circulating job notices known as "clearance orders" among the state and local employment bureaus. To ensure that the employment of aliens under H-2 will not adversely affect the working conditions of similarly employed U.S. workers, the regulations further require that the petitioning employer offer specific terms of work including housing, meals, free tools, a written contract, a guarantee of work or wages for three-fourths of the contract period, and a special wage known as the adverse effect wage rate. 20 C.F.R. § § 602.10a-602.10b (1977).

Regardless of whether or not DOL certifies the petition of the importing employer, INS makes the final decision on the issuance of the H-2 visa petitions. Where no certification is provided by DOL, however, the petitioning employer must "present countervailing evidence [to the INS] that qualified persons in the U.S. are not available and that the employment policies of the Department of Labor have been observed." 8 C.F.R. § 214.2(h)(3). As will be explained, *infra*, we interpret this regulation to mean that the employment conditions mandated by the DOL regulations must be offered to aliens to be employed through the H-2 program unless the INS Commissioner decides that some or all of DOL's conditions will not be required.

—2—

The growers in the Valley did not petition for the H-2 visas individually, but instead formed an association, the Presidio

Valley Farmers Association, for that purpose. The PVFA's thirty-three members ranged from small family farmers to large corporate agribusinesses, but all shared a common goal—the creation of a pool of legal alien labor in the Valley. The growers combined forces so that the administration tasks necessary to obtain the visas from INS could be achieved more easily and more rapidly, and thus relieved individual growers of the recruiting and application responsibilities they otherwise would have faced.

For example, the PVFA, rather than the individual growers, determined the terms and conditions of employment which all Association members would offer. PVFA then filed the required clearance orders with the Texas Employment Commission and circulated advertisements offering the employment in both Texas and Mexico. PVFA then requested DOL to issue certification for its H-2 visa petitions.

DOL refused to certify the petitions, however, primarily on the ground that there was insufficient housing available in the Valley to accommodate migrant workers. DOL also considered the terms of employment offered by PVFA to be insufficient under its regulations. For example, DOL sought to require PVFA to pay its workers an AEWR of $2.83 per hour, but the PVFA repeatedly offered to pay only the minimum wage, $2.20 per hour; and the PVFA failed to offer its workers the required ¾ work guarantee for the terms of their visas.

Despite DOL's refusal to certify the petitions, PVFA urged INS to grant the visas, explaining that the lack of worker housing in Presidio was not a real problem because nearly all of the workers to be employed under the visas could easily commute daily from their homes in Ojinaga. It is unclear from the record precisely what other issues were discussed with INS, but on June 9, 1977, acting INS Commissioner Mario Noto approved PVFA's petition for 809 visas for Mexican nationals to work in the Valley during the 1977 harvest season.[2] The visa petitions offered, *inter alia*,

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[2]PVFA actually filed two separate visa petitions. The first sought visas for 661 Mexican nationals to work from May 1 to November 30,

40-60 hours of work per week for the workers at the minimum wage and a transportation allowance for each worker of $5.00 per week.

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This case presents allegations by the alien workers employed in the Valley under the H-2 visa program that PVFA and its members violated the terms of their employment contracts with the workers, as well as numerous sections of the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.* (repealed 1982), during the 1977 harvest season. The suit was originally commenced as a number of separate class actions, all filed in the Western District of Texas, some of which were based in contract and others which were based on alleged violations of the FLCRA. The actions were eventually consolidated under the *Salazar* heading.

As noted above, the plaintiffs' claims were of basically two varieties: contract claims and claims for violations of the FLCRA. The contractual theory was, in short, as follows. The PVFA, in offering visas to the plaintiffs, offered them a contract of employment for the duration of the visas. The terms of the contract were the conditions of employment included in the visa petitions and the employment conditions required by DOL's H-2 regulations. For plaintiffs, the most important of these conditions were the ¾ work guarantee, an AEWR of $2.83 per hour, and the $5.00 per week transportation allowance.

Plaintiffs further contended that the individual growers, as well as PVFA as an entity, were their joint employers. The employment contract with PVFA, under plaintiffs' theory, was akin to a guarantor arrangement. The PVFA promised that if plaintiffs made themselves available during the terms of the visas, grower members would provide them work, and that if the individual growers failed to honor the terms

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1977; the other sought visas for 148 Mexican nationals to work from May 1, 1977 to April 30, 1978. Both were granted.

of the employment agreement, PVFA would be liable for the breach.

The plaintiffs' FLCRA claims dovetailed with, and to some extent overlapped, the contract claims. As we shall explain in more detail, *infra*, the FLCRA, before its repeal in 1982, regulated farm labor contractors—middlemen who recruit and hire migrant farmworkers—and required certain minimum standards for the employment of such workers. Some of these standards duplicated those required by DOL's H-2 regulations.

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The district court refused plaintiffs' request to certify the 809 H-2 workers as a class under Fed.R.Civ.P. 23(b)(3), and the case went forward with 492 named plaintiffs, all Mexican nationals who worked for PVFA members during the 1977 harvest season. Because of the large numbers of parties suing, however, counsel for both sides took a number of steps to facilitate the court's decision in the case. First, the parties agreed to submit to the court cross motions for summary judgment so that the defendants' obligations under the FLCRA and the terms and conditions of employment that defendants were required to offer could be established. The parties stipulated to certain facts and supported their respective motions with documentary proof that had been developed in discovery.

After hearing arguments on the motions, the court made the following rulings. It held first that PVFA and its members were joint employers of the plaintiffs under a work agreement whose terms were in large part determined by DOL's H-2 regulations. The court found that three provisions in the regulations—the AEWR of $2.83 per hour, the ¾ work guarantee, and the $5.00 per week transportation allowance—were not required conditions of employment, but held that in other respects the employment terms of the regulations should have been honored by the defendants. The court also found that PVFA qualified as a "farm labor contractor" under the FLCRA, thus triggering the obligations of that act.

As we will describe in more detail, *infra*, the court then ordered a separate trial on the issue of liability and damages. Following the trial and after considering motions for summary judgment by both parties, the court determined that PVFA had breached a number of its FLCRA and contractual obligations. These included PVFA's failure: 1) to register with the DOL as a farm labor contractor; 2) to give the workers written disclosures of the terms of their employment; 3) to post the terms of employment at the work site; 4) to keep wage records; 5) to provide wage receipts; and 6) to abide by the following conditions of employment: a) provision of insurance; b) maintenance of wage records; and c) provision of free tools.

The plaintiffs waived their rights to actual damages and instead sought liquidated damages under the FLCRA for both the breaches of the found terms of employment and of the various provisions of the FLCRA.[3] The court assessed damages of $15.00 for each of the violations of the FLCRA—e.g., PVFA's failure to register with the DOL as a farm labor contractor, its failure to provide plaintiffs with a written employment agreement, the growers' failure to maintain wage records—and damages of $300.00 for defendants' failure to abide by the terms of the work agreement—e.g. payment at the minimum wage, the failure to provide free tools. The damages award for these latter violations was limited to piece rate workers.

The Court then determined which individual plaintiffs were entitled to these damages on the basis of their responses

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[3]The FLCRA was amended in 1974 so as to provide a private right of action and a statutory damages provision. Under 7 U.S.C. § 2050a, workers employed by farm labor contractors or other agricultural employers who intentionally violate the Act's provisions may sue for actual damages or, in the absence of actual damages, statutory damages of up to $500.00 per violation.

The FLCRA requires, *inter alia*, that if a farm labor contractor acts as an employer he must abide by the terms of his work agreement, *see* 7 U.S.C. § 2044(b)(4), thus the plaintiffs asserted both their contract claims and FLCRA claims under the Act's statutory damages provision.

to the defendants' interrogatories. If the worker had filed a response and was not one whose complaint was barred by limitations, he was awarded a total of $75.00 for the five found violations of the FLCRA. If the worker had been employed on a piece rate basis he was awarded an additional $300.00 for the breaches of the work agreement. The damages awarded totalled $53,550.00, and the defendants were held jointly and severally liable for that amount.

Plaintiffs appeal, urging that the district court erred in concluding that the work agreement did not include an AEWR of $2.83 per hour, a ¾ work guarantee, and a $5.00 per week transportation allowance. Plaintiffs also complain that the damages awarded were too low, that their suit should have been certified as a class action, and that if denial of certification was proper, the court erred in determining that certain groups of plaintiffs were barred by limitations. Defendants cross appeal, arguing that the district court erred in imposing any liability at all.

II

The primary issue on appeal is whether the district court erred in determining the terms and conditions of employment the defendants were obligated to provide the plaintiffs. Plaintiffs contend that the court erred in failing to find that an AEWR of $2.83 per hour, a ¾ work guarantee, and a $5.00 per week transportation allowance were terms of their employment agreement.

As described above, the DOL regulations that govern the terms of employment that should be offered H-2 workers—20 C.F.R. § § 602.10a-602.10b (1977)—do not themselves create any private right of action, but plaintiffs argue that because such regulations have the force of law, these terms were part of their employment agreement with PVFA and its members. Defendants contend that because DOL's certification of H-2 visa petitions is only advisory to the INS—the INS has the final say in determining whether or not to issue H-2 visas—the only terms of employment applicable here were those PVFA and the growers actually

offered to the plaintiffs. The district court took a middle ground, deciding that DOL's H-2 regulations were "not irrelevant," but declining to find that *all* of the regulations were part of the agreement.

The plaintiffs' position on appeal is that the discretion given to the INS to approve H-2 petitions without certification from the DOL means that the DOL regulations apply *unless* the INS waives such requirements. The plaintiffs find support in the INS regulation which requires that in the absence of certification from the DOL, the petitioning employer must "present . . . evidence that the employment policies of the Department of Labor have been observed." 8 C.F.R. § 214.2(h)(3). The INS, which was for a time a party to this suit, concurred in plaintiffs' construction.[4] Defendants maintain their position that certification has nothing to do with the terms of employment so long as INS issues the H-2 visas without such certification.

The effect of the DOL regulations is not apparent from their face, nor have we any appellate authority to guide us. However, given the purpose of certification and the employment conditions set by DOL's H-2 regulations of ensuring that foreign workers are employed on terms that will not adversely affect the employment available to similarly situated U.S. workers, we conclude that the plaintiffs' proffered interpretation is the more plausible and we adopt it. We hold that the terms of employment set out in DOL's H-2 regulations, 20 C.F.R. § § 602.10a-602.10b (1977), were the terms the defendants were required to offer unless those terms were waived by the INS when it approved defendants' visa petitions. We now examine the plaintiffs' contention that the three requirements rejected by the district court were in fact part of their work agreement.

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[4] The INS stated in admissions filed with the district court:

> It was in 1977, and continues to be, the policy of the INS that the Department of Labor has primary responsibility for determining and enforcing the appropriate minimum labor standards for H-2 workers employed in this country pursuant to an approved visa petition.

The requirement that defendants pay an AEWR of $2.83 per hour was hotly disputed both below and on appeal. Although it is not disputed that DOL requested that PVFA offer an AEWR or $2.83 per hour, the defendants contend that because DOL did not publish an AEWR for agricultural employees in the State of Texas until 1978, the DOL could not require such wages to be paid. Plaintiffs respond that prior to 1968, DOL published an AEWR for all states, and that after 1976 DOL relied on the methodology published in 41 Fed. Reg. 25018 (June 22, 1976) for calculating such wages. Although the DOL continued publication of AEWRs for about a dozen states through 1977 and this list did not include Texas, plaintiffs explain that DOL policy was to require payment of an AEWR in all states and to publish AEWRs for only those states where significant numbers of H-2 workers were employed.

Defendants reply that the regulation granting DOL the authority to determine AEWRs for those states for which rates were not published, *see* 20 C.F.R. § 602.10b(a)(3) (1969), was deleted in 1970. Defendants also point to DOL's statement in 20 C.F.R. § 655.207(a) (1978) that, "except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment," and the language used in the Federal Register notice in 1978 which proposed adding Texas to the list of states for which an AEWR was published: "the adverse effect wage rate for Texas *will be established and set* to prevent the employment of these aliens from having an adverse effect on the wages of U.S. workers who are similarly employed." 43 Fed.Reg. 22996 (May 30, 1978) (emphasis supplied).

In our view, all that can be determined from the history of DOL's AEWR regulations is that the validity or even the existence of non-published AEWRs is at best uncertain. Given the deletion of the regulation that gave DOL the authority to determine unpublished AEWRs and the express language in DOL's regulations that *were* published in 1978, however,

we are persuaded, on balance, that there was no AEWR in effect for Texas in 1977. It is well-established that an agency is bound by its own regulations. *See United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974). We hold that the district court correctly determined that the offered wage rate of $2.20 per hour, the minimum wage in 1977, was the rate that should have been paid under plaintiffs' employment agreement.

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The district court refused to find that the ¾ work guarantee of 20 C.F.R. 602.10a(h) (1977), was part of plaintiffs' work agreement. The ¾ guarantee is a promise that agricultural workers offered employment under the H-2 program will be given work or wages for at least ¾ of the period for which they are to be employed. The DOL requires the guarantee as a condition of employment in order to assure that growers do not "artificially" inflate the labor pool by recruiting more workers than are needed. The district court explained that given the extraordinary circumstances surrounding the issuance of the plaintiffs' visas and the fact that the labor requirements of the growers varied considerably through the harvest season, it would be unduly harsh to have found the ¾ guarantee to be part of the work agreement.

Plaintiffs challenge this ruling on the ground that "harshness" is not an adequate reason to permit defendants to avoid the regulation. We agree. There is no "hardship" exception to the DOL's labor standards for H-2 workers. *Florida Sugar Cane League v. Usery*, 531 F.2d 299, 304 (5th Cir.1976), *quoting Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir.1974). Moreover, there is no indication that the INS excepted the ¾ work guarantee when it approved the visas, and the INS's position in this litigation was that it has never excepted that requirement. As we stated above, we hold that in absence of an INS exception, DOL's H-2 regulations determined the minimum conditions of plaintiffs' employment. The harshness of the requirement ought to have been put before the INS.

The plaintiffs also complain that the district court should have found that the defendants were obligated to pay each worker a $5.00 per week transportation allowance. The pertinent DOL regulation, 20 C.F.R. § 602.10a(g) (1977), required employers petitioning for H-2 workers to offer "transportation from the workers' on-the-job-site living quarters to the place the work is to be performed . . . without cost to the worker." Because none of these plaintiffs were "on-the-job-site" workers and instead commuted from their homes in Mexico, the district court found that the regulation by its very terms was inapplicable.

Plaintiffs argue on appeal that their right to the transportation allowance does not hinge on the terminology of DOL's regulation, explaining that PVFA *promised* in its visa petitions that it would pay a $5.00 transportation allowance to workers who accepted the visas. By offering this term of employment even where the DOL regulations did not require it, plaintiffs contend, the $5.00 allowance became part of the employment agreement.

We think plaintiffs' point is well-taken. The defendants have repeatedly argued that the terms of plaintiffs' employment were only those terms defendants chose to offer, and the record demonstrates that a transportation allowance was in fact offered by PVFA. Although the regulations set the minimum terms of employment, we do not believe they prohibited the defendants from offering additional benefits. Having promised to pay each plaintiff a $5.00 per week transportation allowance, PVFA became contractually obligated to do so.

III

The next set of issues we must address are raised in PVFA's cross appeal. PVFA argues that the district court erroneously concluded that the Association acted as a farm labor contractor when it petitioned the INS for visas on behalf of its members and when its members recruited the plaintiffs to accept the visas. PVFA also argues that even

if it was a farm labor contractor, its violations of the FLCRA and the work agreement were not "intentional" and thus cannot support an award of damages, and that most of the alleged violations were committed by individual growers rather than the Association. We address each contention in turn.

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The FLCRA was enacted in 1963 to protect migrant and seasonal farmworkers from abuses of the farm labor contractor system. *See Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1279 (5th Cir.1985); *Soliz v. Plunkett*, 615 F.2d 272, 276 (5th Cir.1980). *See generally* Note, *A Defense of the FLCRA*, 59 Texas L.Rev. 531 (1981). The Act regulated both those who qualified as farm labor contractors and those who employed such contractors. In brief, "[t]he Act guarantee[d] that farmworkers receive[d] notice of the terms and conditions of employment offers, and generally deter[red] employers from exposing farmworkers to hazardous conditions, breaching employment agreements, or denying farmworker employees the rights and benefits secured by other federal statutes." Note, *supra*, at 531.

PVFA argues that the Act cannot apply here because PVFA did not qualify as a farm labor contractor. There are several requirements under the statute. A farm labor contractor is one who: (1) recruits, solicits, hires, furnishes or transports, (2) for a fee, (3) migrant workers, (4) for agricultural employment. 7 U.S.C. § 2042(b). Here the "fee" requirement is satisfied by the dues the grower members paid to the PVFA, and the last two requirements are concededly met. The PVFA denies, however, that in petitioning for the H-2 visas and offering those visas to the workers through its grower members that it "recruited," "solicited," "hired," or "furnished" workers to its members.

The district court found that three actions of the PVFA met this requirement of the statute. First, the articles of incorporation for the PVFA set out as its purpose to "contract for and obtain migrant labor for the use of its members";

second, the PVFA solicited workers through newspaper and radio ads in both Texas and Mexico pursuant to DOL certification procedures; and third, the PVFA petitioned INS for the H-2 clearance visas.

The PVFA responds that its articles of incorporation are irrelevant because they were written after these plaintiffs were employed, that plaintiffs cannot rely on the radio and newspaper ads because none of them were actually recruited through those ads, and that the H-2 visa petitions were acts solely between PVFA and the INS. PVFA adds that most if not all of the 809 aliens for whom visas were sought had worked or were already working for PVFA members. Thus the recruitment process for their employment under H-2 involved only the efforts of the member growers to determine which of their current or past employees desired to have PVFA petition for a visa for them. Finally, the PVFA argues that a non-profit association such as itself simply is not the sort of middleman/recruiter that the FLCRA was intended to cover.

We are not persuaded. The articles of incorporation are relevant evidence of the purpose for which PVFA was formed in 1977, and the advertisements and visa petitions were indisputably direct efforts by the PVFA to create a pool of temporarily legalized labor which its members could share. It was PVFA, not the individual growers, who determined what terms of employment would be offered in the H-2 visa petitions. It was PVFA, not the individual growers, that was listed as the plaintiffs' employer on the INS visa petitions. That the final step in the recruiting process was carried out by PVFA grower members who approached those workers already on their farms does not remove PVFA's "middleman" status, for the efforts of the individual growers were made *on behalf* of the PVFA and its members. In fact, several of the growers did no recruiting and relied on the efforts of other members to recruit enough Mexican workers to meet the needs of all of the growers in the Valley. Indeed, although the majority of the plaintiffs were employed by a single grower, over the course of the harvest many worked

for more than one PVFA member because the growers shared the workers among themselves as their employment needs varied.

In short, the record demonstrates that the PVFA, as an entity and through its members, acted very much as a middleman between the member growers and the plaintiffs, and succeeded in creating a legalized labor pool for the growers' common benefit. These activities fit comfortably within those Congress intended to regulate under the FLCRA. *See Almendarez*, 762 F.2d at 1281 (holding vegetable packing shed operators to be contractors under the FLCRA where the operators "[could] identify no functional distinction between their activities . . . and those of the middlemen recognized as farm labor contractors [under the Act].")

Nor is our analysis changed because of PVFA's status as an unincorporated association at the time these events took place. Similar associations of growers have previously been found to be farm labor contractors under the Act, *see Marshall v. Coastal Growers Ass'n*, 598 F.2d 521 (9th Cir.1979), and commentators have urged that coverage of nonprofit associations of farmers was intended by the drafters of the FLCRA. *See* Note, *supra*, 59 Texas L.Rev. at 553-54. The defendant growers received the benefits of combining in the Association; we will not now ignore its role.

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Nor do we agree with defendants that the district court erred in holding the PVFA and its member growers liable for damages under the FLCRA for their "intentional" violation of the Act's provisions. We set out the test for "intent" under the FLCRA in *Castillo v. Givens*, 704 F.2d 181 (5th Cir.), *cert. denied*, _____ U.S. _____ , 104 S.Ct. 160, 89 L.Ed.2d 147 (1983). Intentional means "conscious or deliberate"; *id.* at 197; there is no requirement of a specific intent to violate the FLCRA; rather, "the standard for an intentional violation [is] . . . 'the common civil standard which holds a person liable for the natural consequences of his or her acts.'" *Id.* at 197-98, quoting *DeLeon v. Ramirez*, 465

F.Supp. 698, 705 (S.D.N.Y.1979). The district court applied the *Castillo* test in determining that the defendant's violations were intentional.

Defendants argue that the Court's recent opinion in *Trans World Airlines, Inc. v. Thurston*, _____ U.S. _____, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), which overturned our construction of "willful" under the FSLA in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972), suggests that our interpretation in *Castillo* was too generous. We disagree. The standard for showing willful violations of the ADEA so as to trigger its liquidated damages provisions, which Congress intended to be punitive in nature, *see Thurston*, 105 S.Ct. at 624, should not be applied here. As we explained in *Castillo*, the courts have construed the "intent" requirement necessary to trigger the damages provisions of the FLCRA so as to further the Act's *remedial* purposes. 704 F.2d at 198. *Accord Almendarez*, 762 F.2d at 1281. Our adoption of the general civil standard for intent furthers that purpose, and we will not depart from it here.[5]

Defendants also suggest that the district court failed to make the factual findings necessary to support a conclusion that their violations of the FLCRA were intentional, because

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[5]Defendants also argue that their violations were not intentional because they were unaware of the FLCRA and the necessity of complying with it. The argument is without merit. Were we to require that a defendant have knowledge that he was violating the FLCRA before labeling his actions "intentional," we would change the intent standard to one of "specific intent," a standard we rejected in *Castillo*. The focus under the standard we adopted there is on the deliberateness of the conduct involved, not the defendant's knowledge of the Act.

In any event, the record contains sufficient evidence to support a conclusion that the defendants were aware of the FLCRA. The president of PVFA, Bill Bishop, admitted that he was aware of the Act in 1977 and that he had previously hired workers through farm labor contractors. In addition, the Texas Employment Commission called PVFA officials' attention to the Act in 1977 because the clearance orders PVFA filed with the Commission stated, as they were required to, that PVFA was in compliance with the FLCRA.

the court did not expressly find their acts to be "conscious or deliberate." Moreover, defendants argue, the record could not have supported such a finding. We are not persuaded. We think the district court's conclusion that defendants' acts met the intent standard set out in *Castillo* is both implicit and explicit in its memorandum opinion on liability and damages. For example, the court stated that it found that defendants carried out an "intentional pattern and practice" of failing to pay piece rate workers at the minimum wage and that plaintiffs suffered from "defendants' intentional violations of the FLCRA . . . ." We refuse to read the district court's opinion so hypertechnically as defendants. The court's conclusion that these violations were intentional is adequately supported by the record and is not clearly erroneous.

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Lastly, defendants contend that PVFA cannot be held responsible for breaches of the FLCRA and work agreement to the extent that such violations occurred in day to day employment activity—e.g. the failure to pay adequate wages, provide wage receipts, or maintain wage records. These violations, defendants argue, were committed by the individual growers who employed the workers on a day to day basis and not by the PVFA, thus the PVFA cannot be held responsible fo them.

We disagree because, in our view, the district court correctly found PVFA to be the joint employer of the plaintiffs. The PVFA cannot seriously challenge this finding since it repeatedly represented itself to be the plaintiffs' employer when applying to the INS for the H-2 visas. Indeed "employer" status was necessary to obtain the visas since they could be granted only on the petition of the "importing employer." In addition, as we explained in part III, 1 of this opinion, *supra*, the PVFA, acting for the joint benefit of its members, determined the terms and conditions of employment that the growers would offer and recruited workers to accept the visas. Its members then freely shared the workers among themselves. We agree with the district court that these representations and actions render the PVFA

liable for the FLCRA violations and breaches of the employment agreement as a joint employer of the plaintiffs.[6]

IV

Both plaintiffs and defendants attack the district court's award of damages. Plaintiffs contend that the court abused its discretion in determining liquidated damages for violations of the provisions of the FLCRA and that the liquidated damages award for defendants' breaches of the work agreement was inadequate and improperly limited to piece rate workers. Defendants do not challenge the damage awards relating to specific provisions of the FLCRA, but contend that plaintiffs did not properly prove up their damages for defendants' alleged breaches of the work agreement.

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The FLCRA provided in pertinent part that:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

7 U.S.C. § 2050a(b) (repealed 1982). As we explained in *Beliz v. McLeod & Sons Packing Co.*, _____ F.2d _____, slip op. 5729 (5th Cir.1985), the purpose of this civil remedy is both compensatory and punitive. It is designed to "correct

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[6]The defendants also argue that they cannot be held liable under the FLCRA because Congress extinguished plaintiffs' causes of action when it enacted the MSAWPA. *See infra* section IV, 1 and n. 7. This argument is without merit. Section 109 of Title 1 of the United States Code provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability . . . .

There is no such expression of intent in the MSAWPA.

the exploitive practices that have historically plagued the migrant farm labor market." *Id.* at ___ , slip op. at ___ .

Although the statutory goals are readily apparent, our review of these awards is limited because the amounts set are a matter for the discretion of the district court. We have held that, when liquidated damages are sought under this provision, the district court has discretion to award an amount *up to* $500. *Castillo v. Givens*, 704 F.2d at 197 n. 37. The court is not *required* to award $500. *Id. See also Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir.1981) (rejecting argument that where liquidated damages, rather than actual damages are sought, court must award $500 for violation). As we noted in *Beliz*, "[t]he courts have articulated no systematic criteria to guide the exercise of a trial court's discretion in fixing the amount of damages, but this is an almost inevitable result of imparting discretion . . . . Rigid rules would deny the district court [that] discretion . . . ." ___ F.2d at ___ , slip op. at ___ .

The district court awarded damages of $15.00 for each of the following violations of the FLCRA: 1) PVFA's failure to register as a farm labor contractor; 2) PVFA's failure to provide a written work contract to each plaintiff; 3) the growers' failure to post the terms and conditions of employment at the work site; 4) the growers' failure to maintain wage records; and 5) the growers' failure to provide plaintiffs with wage receipts. The court was careful to outline the considerations that guided it in determining these amounts: Congress' intent in the FLCRA to "cur[e] abuses in the agricultural market"; the substantive impact on plaintiffs caused by defendants' violations; the intentional aspect of defendants' violations; and the impact on the general public that would result from the court's assessment of liquidated damages against the defendants.

The plaintiffs challenge these awards as too low to vindicate their private right of action under the FLCRA. Plaintiffs also argue that the district court improperly labelled the violations as "technical," that the court failed to consider

the willfulness of defendants' violations, and that the court erroneously took into consideration the fact that Congress eliminated the plaintiffs' FLCRA claims when it replaced that Act with the Migrant & Seasonal Agricultural Worker Protection Act, 29 U.S.C. § § 1801-1872.[7]

Whether or not we might have been inclined to award greater damages than did the district court for these FLCRA violations, the district court supported its decision with factors that could properly be considered by it, and we cannot find an abuse of discretion. Although the damages assessed for each violation appear thin when considered separately, we cannot ignore their weight when combined in an award that included damages for other violations; nor can we ignore the fact that these damages were awarded to over 150 persons. The district court was properly concerned with the possibility that an unreasonably excessive damage award might not only punish defendant growers, but might also ultimately harm plaintiffs, individuals whose welfare was linked to that of the Valley's farming industry as surely as was that of the defendants. As we stated in *Beliz*, "the total number of plaintiffs involved, the total number of violations, and the total amount that will be exacted from the delinquent defendant" are all relevant considerations. *Beliz*, ___ F.2d ___ , slip op. at ___ . Such concerns are part and parcel of the discretion Congress afforded the district courts in assessing FLCRA damages.

Plaintiffs' remaining challenges to the award are also without merit. First, we think the record supports the court's finding that the defendants' violations of the Act were intentional, but the evidence certainly did not compel the court to conclude that the violations were willful. Nor did the court err in considering the MSAWPA or in labelling defendants' violations "technical." The court explained that it considered the MSAWPA mindful that the savings statute

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[7] 29 U.S.C. § 1802(6), (8)(B)(ii), (10)(B)(iii) excludes "any temporary nonimmigrant alien who is authorized to work in agricultural employment under [H-2] and § 1184 of Title 8" from coverage under the MASWPA.

of 1 U.S.C. § 109 mandated that "the repeal of the FLCRA should have *no impact* on the bringing of this action," and that it considered the MSAWPA only "to fully determine the actual legislative intent and purpose to be served in this action" (emphasis added). Finally, the court "stress[ed] that it d[id] not wish to minimize defendants' actions by labelling some of those actions as Technical Violations . . . ." The court explained that it had done so only "in order to set forth th[e] complex and convoluted set of facts in a reasonably comprehensible fashion . . . [and] with the hope that no person [would] employ semantic sport to thwart the clear intent of th[e] Court." We refuse to thwart that intent on appeal, and note that, in any event, consideration of the substantive or technical nature of the violations is entirely proper. *See Beliz*, ___ F.2d ___ & n. 72, slip op. at ___ & n. 72. We affirm the district court's exercise of its discretion in awarding $15.00 in damages for each of defendants' violations of the FLCRA.[8]

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Both parties attack the court's award of $300.00 for defendants' alleged breaches of the work agreement. Before addressing these contentions, we must explain the somewhat unique procedure the district court employed to assess liability and damages once it had determined what defendants' obligations were under the FLCRA and under the work agreement.

Although the parties did not dispute that the PVFA and its grower members had violated the various provisions of the FLCRA described above, they did dispute the extent to which the defendants had violated the terms of their work agreement with the plaintiffs. Moreover, it was con-

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[8]Plaintiffs also complain that the district court erred in failing to hold defendants liable for making false and misleading statements to plaintiffs in violation of 7 U.S.C. § 2044(b)(2). We find no error in this omission because we are not persuaded that the record could support a finding that defendants made such statements. In any event, any damages awarded for breaches of the terms of the work agreement would suffice to compensate plaintiffs for this asserted violation.

ceded by plaintiffs that liability and damages for these breaches, although quite similar, would vary from individual to individual. Because such liability and damages would vary, it appeared that each of the hundreds of Mexican plaintiffs, most of whom could not speak English, would have to testify about his conditions of employment to establish his right to recovery and the damages he had sustained.

All parties were anxious to proceed with the damages phase of the case, yet none wished to pursue this course. Accordingly, the plaintiffs proposed the following approach. Plaintiffs were willing, they explained, to waive their rights to actual damages for breaches of the work agreement and would pursue instead liquidated damages for those violations under the FLCRA.[9] The court could then conduct a brief damages trial in which it would hear testimony from a number of "representative plaintiffs," testimony sufficient to enable the court to determine conditions of employment that would be considered to have been common to all plaintiffs. Based on that testimony, the court could also decide on a sum of liquidated damages that would be appropriate in light of the found violations. In short, plaintiffs suggested that the parties could avoid the difficulties of specific proof because the court need not determine actual damages for each plaintiff nor determine the particular conditions of employment that each faced. The court could instead extrapolate from the proof offered by the representative plaintiffs at the damages trial and award the damages so determined to the remaining plaintiffs on the basis of evidence developed in discovery—primarily, plaintiffs' answers to defendants' interrogatories.[10]

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[9]Because the court had denied plaintiffs' right to the AEWR, the transportation allowance, and the ¾ work guarantee, the core of the plaintiffs' contractual claims had been lost; thus this "waiver" was less significant than it would otherwise have been.

[10]Under plaintiffs' proposal, both parties would submit motions for summary judgment following the damages trial. These motions were to provide a means not only for plaintiffs to show, based on sworn evidence (the sworn answers to interrogatories) that those not testifying at the

The court adopted and followed plaintiffs' suggested procedure in determining damages for breaches of the work agreement. After three days of testimony and considering motions for summary judgment by both parties which the court described as supported by "voluminous proof," the court found that defendants breached their employment agreement as to those plaintiffs who were employed on a piece rate basis in three ways: 1) failing to pay plaintiffs a minimum wage; 2) failing to provide plaintiffs free tools; and 3) making unauthorized deductions from plaintiffs' wages. The court then decided that the sum of $300.00 was proper liquidated damages for those violations and awarded that amount to each plaintiff whose answers to defendants' interrogatories showed him to be a piece rate worker.[11]

Both parties attack the award. Plaintiffs complain that the sum of $300.00 is too low, that it does not compensate them for a number of violations proved at the damages trial, and that the award was improperly limited to piece rate workers. Defendants attack the damage award because nearly all the plaintiffs who received it recovered on the basis of their answers to defendants' interrogatories. Defendants argue that they never consented to try damages on this basis and that the interrogatories are hearsay which cannot support an award of damages.

Although we would not otherwise question the sum of $300.00 as too low, we agree with plaintiffs that the district court inexplicably omitted from its liability findings and damage award a number of asserted violations[12] and that the court did not explain its basis for limiting that award

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trial were similarly situated to those who testified, but also for defendants to point out, with the same sort of evidence or with affidavits, any plaintiff who was not similarly situated to the representative plaintiffs.

[11]Only seventeen of the 159 plaintiffs whose claims were not barred by limitations were not employed on a piece rate basis; thus the overwhelming majority of the plaintiffs who recovered were awarded $375.00.

[12]These include primarily plaintiffs' claim that the defendants breached their obligation to provide insurance coverage for the H-2 workers.

to piece rate workers. We do not resolve these issues but rather vacate the damages award so that the district court can address them on remand. The court will have to reassess its award, in any event, to determine the changes to be made in the award, if any, in light of our conclusion that the ¾ work guarantee and $5.00 transportation allowance were part of the work agreement, and we think these other issues can best be addressed at that time.[13]

More fundamentally, we agree with the defendants that the award cannot stand because there was no consent to the procedures employed to assess liability and damages. We recognize that the district court faced a difficult problem, given the number of parties involved and the complexity of the case, and that the procedure followed was a useful means of resolving those difficulties fairly and expeditiously. The procedure founders, however, for lack of evidence in the record that the defendants either understood or agreed to it. Indeed, we confess that we are not fully confident that our understanding of the procedures employed is what the plaintiffs intended, although we believe our interpretation accurately reflects what the district court intended to accomplish. These questions are best resolved on remand where the procedures to be used to determine liability and damages for the breaches of the work agreement can be formalized in a pre-trial order consented to by all of the parties.

V

The next set of issues pertain to the district court's refusal to certify as a class under Fed.R.Civ.P. 23(b)(3) the 809 workers for whom the defendants obtained visas. In the event that we affirm the court's refusal to certify the class, plaintiffs ask us to reverse the court's determination that

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[13]Defendants argue that because at the liability/damages trial plaintiffs sought liquidated damages under the FLCRA rather than actual damages, plaintiffs have waived their rights to any actual damages, including damages for the ¾ work guarantee and the $5.00 transportation allowance. We leave this matter for the district court to resolve in the first instance on remand.

a number of plaintiffs are barred by limitations. Before addressing these issues, we should explain the convoluted procedural history behind this case.

Salazar v. PVFA is, in fact, four separate actions by H-2 workers in the Western District of Texas that were consolidated prior to trial: *Lara v. PVFA* (six plaintiffs); *Salazar v. PVFA* (251 plaintiffs); *Primero v. PVFA* (251 plaintiffs—the same plaintiffs as in *Salazar*); and *Zuniga v. PVFA* (235 plaintiffs). *Lara*, the first action brought, was filed as a class action in the El Paso division in April 1979 on behalf of all 809 Mexican nationals who worked under the H-2 program in 1977. The El Paso court denied class certification on March 30, 1981. Plaintiffs then filed the *Salazar* and *Primero* actions in the Pecos division, each suit naming the same 251 plaintiffs, all of whom were members of the putative class in *Lara*. The only difference in *Salazar* and *Primero* were the claims made; one alleged breaches of the FLCRA, and the other alleged causes of action in contract. Plaintiffs attempted to bring both suits as class actions, suggesting the same class denied in *Lara*, but the district court denied class certification on February 2, 1982. Two days later, 235 additional members of the putative class moved to intervene in the *Salazar/Primero* cases, but the court denied intervention. These 235 individuals then filed a separate complaint, the *Zuniga* action, in the Pecos division, alleging the same causes of action brought in *Salazar/Primero*. The *Lara* case was transferred from the El Paso division to the Pecos division, and the court consolidated all four cases under the *Salazar* heading.

—1—

Plaintiffs complain that the Pecos court erred in refusing to certify the class. The court cited as its reasons the same reasons given by the El Paso court that denied certification in *Lara*: (1) common questions of law and fact did not predominate because the plaintiffs' claims varied with the employment conditions each faced; and (2) a class action was not necessarily the superior method for handling the controversy. Plaintiffs complain that common issues did

predominate and that the court ultimately handled *Salazar* as if it were a class action, therefore demonstrating that its initial refusal to certify the class was an abuse of discretion.

We disagree. The district court has broad discretion in determining whether or not to certify a class under Rule 23. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); *Danner v. United States Civil Service Comm'n*, 635 F.2d 427, 433 (5th Cir.1981). As explained in *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983):

> Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts. We recognize that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people. It follows that class certification decisions must be protected by a level of review that accords substantial discretion. At the same time we keep in mind that while Rule 23 is not self defining and employs sometimes internally overlapping indexes, it is, nonetheless, a rule with limits both internal to the rule and without.

It is in this spirit, one that accords the trial court decision the substantial discretion which is its due, that we review the court's refusal to certify the class in this case.

We find no abuse of discretion here. Although the court subsequently treated the case almost as if it were a class action, it did so only upon the asserted agreement of the parties when faced with liability and damages issues which, although similar, were concededly individual. That the court agreed to proceed on this basis does not suggest that its initial determination that common issues in the suit did not predominate was incorrect, and certainly does not make that earlier decision an abuse of discretion.

Although we affirm the district court's refusal to certify the class, we in no way restrict the court's discretion to change that decision on remand. It is well-settled that decisions on class certification are always interlocutory. *See, e.g., Elster v. Alexander*, 608 F.2d 196, 197 (5th Cir. 1979) ("The district court has a continuing power under Fed.R.Civ.P. 23(c)(1). The certification decision 'is not irreversible and may be altered or amended at a later date,'" *quoting* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1785 at 137 (1971)).

—2—

The district court refused to award damages to any of the *Zuniga* plaintiffs, reasoning that all of those individuals' claims were barred by limitations. The district court noted that Congress did not set any statute of limitations for damage actions under the FLCRA, hence it applied the Texas statute of limitations for analogous types of actions. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1971) ("[W]hen a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right the general rule is to apply the state statute of limitations for analogous types of actions.") The court correctly determined the most analogous Texas statute to be Tex.Rev.Civ.Stat. art. 5526 § 4, which at the times pertinent here, imposed a limitations period of two years on "actions for debts . . . not evidenced by a contract in writing." The court then applied *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), which holds that the statute of limitations for putative class members is tolled pending a decision on class certification, *see id.* 103 S.Ct. at 2397, and ruled that limitations were tolled for all 809 workers during the time that elapsed between the date *Lara* was filed and the date the El Paso court denied class certification in *Lara*. According to the court's calculations, the claims of all of the plaintiffs in the *Zuniga* group were time-barred even considering the time added to limitations by tolling.

Plaintiffs argue on appeal that under *Crown* limitations tolled as well during the ten months when class certification in *Salazar/Primero* was pending, thus making the limitations period long enough to include all of the *Zuniga* plaintiffs. *Crown*'s tolling principle applies, plaintiffs argue, not only for the first class certification petition filed but also for any subsequent petitions involving the same class. We are not persuaded. Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any. To the contrary, it has repeatedly been noted that "the tolling rule [in class actions] is a generous one, inviting abuse," *see id.* at 2398 (Powell, J. concurring); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 561, 94 S.Ct. 756, 770, 38 L.Ed.2d 713 (1974) (Blackmun, J., concurring), and to construe the rule as plaintiffs would have us presents just such dangers. Given the particular facts here, we decline the invitation.

Plaintiffs correctly point out, however, that the district court made certain miscalculations in determining when limitations expired. The court stated that class certification was denied in *Lara* on March 21, 1981 and that the *Zuniga* complaint was filed on April 2, 1982, when in fact the correct dates are March 30, 1981 and March 2, 1982, respectively. These corrections indicate that the district court's calculations are off by 39 days. Since the court concluded that limitations expired for the *Zuniga* plaintiffs on May 9, 1978, and the last workday for any of the plaintiffs was April 30, 1978, this correction may alter its decision on which *Zuniga* claimants are time-barred. Accordingly, we vacate the court's decision on limitations so that it may calculate anew the limitations deadline applicable for the *Zuniga* claimants.

VI

Finally, plaintiffs complain on appeal that the district court's judgment contained errors of law as well as clerical errors with respect to the damages awards. The primary dispute concerns the district court's refusal to award

damages to eighty-nine plaintiffs who were not named in the *Lara*, *Salazar*, or *Primero* complaints but who moved for judgment after the liability/damages trial based on their answers to defendants' interrogatories. The district court permitted recovery by only those plaintiffs who were both named in one of the four complaints and who had also filed answers to the interrogatories. Plaintiffs contend that the district court should have allowed their counsel to add those individuals to the pleadings under Fed.R.Civ.P. 15(b) on the ground that the case had been tried by consent with respect to them.

We are not persuaded. Rule 15(b) permits amendments where issues not raised by the pleadings are in fact tried by the express or implied consent of the parties. *See, e.g., American Standard Credit v. National Cement Co.*, 643 F.2d 248, 257 n. 4 (5th Cir.1981). *See generally* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493 (1971). Although the rule is a generous one which effects the desirable policy of bringing pleadings in line with issues that actually were developed at trial, we do not think it should be construed here to encompass individuals who were not named plaintiffs in any of the four consolidated cases. The liability trial conducted with representative plaintiffs and defendants was not sufficient to apprise defendants that they were litigating claims of individuals other than those named in the four complaints. The court was therefore within its discretion in refusing plaintiffs' post-judgment offer to amend their pleadings.

It appears, however, that defendants conceded below that at least nine of the 89 individuals were named in one of the four complaints.[14] We vacate the district court's judgment insofar as it denied recovery to those individuals and remand

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[14]These individuals are:

Ansires Grado
Francisco Ontiveros Lara
Baudilio Rivas Gardea
Patricio Herrera Carreon
Isidro Hernandez
Isael Tercero
Evangelina Tavarez
Rigoberto Diaz Franco

so that the court can determine the damages to which those plaintiffs are entitled.

It also appears that the names of fifteen other individuals may have appeared in one of the four complaints in slightly altered spellings. For example, Amado Salazar Hurtado filed interrogatory answers and a similar name, Alfredo Salazar Hurtado, appears in the *Salazar* complaint. The names do not match precisely, but given that the names in the captions and interrogatories were in most cases either transcribed from the signatures of functionally illiterate clients or transcribed phonetically in the process of individual interviews, we think some leeway is appropriate. At the least, plaintiffs should be permitted to offer additional evidence on these individuals.[15] We vacate the judgment as to them so that the district court can consider this issue if the plaintiffs can in fact come forward with such evidence.

Plaintiffs also argue that the district court erroneously listed as *Zuniga* plaintiffs fourteen individuals[16] whose names are similar to names in the captions in both *Salazar*

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[15]These individuals answered interrogatories under the following names:

Luis Anaya Terrazas
Jesus Avila Lara
Librado Gallegos Urias
Amadina Guzman Astorga
Dionisio Licon Galindo
Joaquin Ortiz Olivas
Benjamin Peregrino Martinez
Eleazar Peregrino Martinez
Gilberto Tercero Galindo
Huberto Saenz Gonzalez
Amado Salazar Hurtado
Carmen Aguirre Acosta
Miguel Hernandez Lujan
Jesus Manuel Contreras
Leonardo Ovalle Valles

[16]These individuals are listed in the *Salazar* complaint as:

Maximo Cabrera Lopez
Jorge Hinojosa C.
Manuel Guzman
Cruz Hinojos de Leon
Jose Mercedes Rivera
Guadalupe Sanchez
Teodoso Vasquez Mata
Joaquin Otilio Villalobos H.
Antonio Salazar
Antonio Olivas Ramirez

and *Zuniga*, and that the court erroneously listed three workers[17] as non-piece rate workers whose interrogatories showed them to be piece rate workers. These complaints appear to have merit. We vacate the district court's judgment as to these plaintiffs as well so that the district court can resolve these disputes in the first instance.

Finally, plaintiffs point out that the district court inadvertently failed to include in its judgment an award of $600.00 for attorney's fees. This omission was error and should be cured on remand.

VII

To summarize, we affirm the district court's determination that the AEWR of $2.83 per hour was not one of the terms of plaintiffs' employment agreement but reverse its determination that the ¾ work guarantee and a $5.00 weekly transportation allowance were not part of that agreement. We affirm the district court's holding that PVFA was a farm labor contractor, that PVFA was a joint employer of plaintiffs, and that PVFA and the growers intentionally violated the FLCRA. We also affirm the liquidated damages awarded by the district court for defendants' breaches of the FLCRA. Because we have concluded that additional terms were part of the work agreement, however, we vacate the award of damages for defendants' alleged breaches of the agreement and remand so that the district court can award damages for those terms and so that it can consider the parties' other complaints about the award.[18] We affirm the court's

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Ramon Aguirre Hernandez
Bertha Rodriguez Romero
Matilda Olivas Rodriguez
Marcelino Olivas Rodriguez, one of the 6 original *Lara* plaintiffs, should also be included in this group.

[17]These individuals are:
Matias Hinojos Rey
Severiano Hinojos Quinonez
Cecilio Soto Perez

[18]The district court should first address the defendants' argument that plaintiffs have waived their rights to actual damages. If there has

denial of class certification and its decision on limitations, but order a recalculation of limitations for the *Zuniga* plaintiffs. Finally, we vacate the judgment as to the plaintiffs listed in notes 14-17 so that the district court can correct possible clerical and other errors in the judgment.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

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been such a waiver, the court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

APPENDIX G

**Order Of The United States Court of Appeals
For The Fifth Circuit
Denying Petitions For Rehearing**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1163

AMADO SALAZAR CALDERON, *ET AL.*,
Plaintiffs—Appellants
Cross Appellees,

versus

PRESIDIO VALLEY FARMERS ASSOCIATION,
ET AL.,
Defendants—Appellees
Cross Appellants,

**Appeal From The United States District Court
For The Western District Of Texas**

ON PETITIONS FOR REHEARING
(September 19, 1985)

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

PATRICK E. HIGGINBOTHAM
United States Circuit Judge

APPENDIX H

Letter Of March 30, 1977
From Troy R. Cargill, Certifying Officer
Of The U.S. Department Of Labor,
To Bill J. Bishop
Denying Labor Certification

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
555 GRIFFIN SQUARE BUILDING
GRIFFIN AND YOUNG STREETS

March 30, 1977 DALLAS, TEXAS 75202

Mr. Bill Bishop
Presidio Valley Farmers
Association
Presidio, Texas

Dear Mr. Bishop:

Mr. Richard Slack, your State Representative, requested that we provide you with the required employer documentation to receive consideration for alien employment certification.

Based on the fact that the prospective employers do not have housing that meets the requirements of 602.10, labor certification cannot be considered.

For your guidance, we are enclosing 602.10, The Certification Process and Guidelines that explain the procedure for petitioning for alien workers.

We trust this information will be helpful.

Sincerely,

TROY R. CARGILL
Certifying Officer

APPENDIX I

Statutes and Regulations

Farm Labor Contractor Registration Act, 7 U.S.C. § 2050a (1977):

(a) Any person claiming to be aggrieved by the violation of any provision of this Act or any regulation prescribed hereunder may file suit in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

(b) Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action. If the court finds that the respondent has intentionally violated any provision of this Act or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief. Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28, United States Code.

(c) If upon investigation the Secretary determines that the provisions of this Act have been violated, he may petition any appropriate district court of the United States for temporary or permanent injunctive relief.

(d) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General.

U.S. Department of Labor Temporary Foreign Labor Certification Regulations, 20 C.F.R. § 602.10 (1977):

§ 602.10 The certification processes.

(a) Section 214.2(h)(3) of the Immigration and Naturalization Service Regulations (8 CFR 214.2(h)(3)) requires, in support of a petition for the admission of an alien to perform certain temporary service or labor, that

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii) of the Act.

The criteria and procedures set forth herein prescribe (1) the conditions under which U.S. workers must be recruited for agricultural or logging employment (except for employment as sheepherders) before a determination of their nonavailability can be made and (2) the terms of employment for both U.S. and foreign workers which will not adversely affect the wages and working conditions of American workers similarly employed.

(b) Agricultural or logging employers including association employers anticipating a labor shortage may request a certification for temporary foreign labor, provided that the employer or the association and those of its members for whom the services of foreign workers are requested, prior to making such a request, have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs in accordance with the provisions of this section and § § 602.10a and 602.10b. Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the ETA 60 days to determine the availability of domestic workers, in addition to the time necessary for the employer to secure foreign workers by the date of need if the certification is approved.

(c) Request for certification shall be in writing and describe all efforts made by the employer to obtain U.S. workers to fill the employer's need.

(d) When received, the request for certification shall be forwarded by the local office of the State employment service to the appropriate RAETA together with information which indicate the extent to which the requirements set forth in this section have been met and a detailed report of labor availability, recruitment efforts undertaken by and on behalf of those requesting the use of foreign workers, and any other information required by the ETA. The RAETA may then issue the certification if he finds:

(1) That the employment of such workers will not adversely affect the wages and working conditions of domestic workers similarly employed; and

(2) That reasonable efforts have been and will continue to be made by the Employment Service and the employers to obtain domestic workers at wage rates and conditions of employment no less favorable than those set forth in the regulations in this part, to perform the work for which the services of temporary foreign workers are requested, and for which domestic workers are not available. Reasonable efforts will include, where deemed appropriate by the RAETA, full use of workers who commute on a daily basis between their residence and the place of employment, the use of the interstate clearance system, full participation in special youth recruitment programs, and the use of other recruitment measures which have produced or are expected to produce effective resuits.

(e) Certifications will be denied in whole or in part if the findings set forth in paragraph (d) of this section cannot be made or;

(1) Where the employer has been found to have failed without good cause to comply with employment contracts with United States or foreign agricultural or logging workers;

(2) Where the admission of the foreign workers would result in violation of policies of the U.S. Department of

Labor governing the referral of workers to jobs involved in strikes or other labor disputes (see § 602.2(b));

(3) Where the employer has failed to comply with any applicable requirements of the foreign government whose nationals are involved; or has failed to abide by any applicable State or local labor, health or housing laws;

(4) Where, within the period commencing with the filing of the job offer in relation to this or any prior certification and extending so long as foreign workers are employed, the wages and working conditions provided to any foreign or U.S. workers similarly employed have been less favorable than those required to be offered to U.S. workers in accordance with § § 602.10a and 602.10b;

(5) Where the Immigration and Naturalization Service has notified the Secretary of Labor that the employer has had in his employ any foreign worker who was not lawfully in the United States, unless the employer demonstrates that he did not know, had no reasonable grounds to suspect, or could not by reasonable inquiry have ascertained that the alien worker was not lawfully in the United States.

(f) In any case in which the RAETA determines after examination of all the pertinent facts that certification cannot appropriately be issued, he shall promptly so notify the employer or association requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-849

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,

Petitioners

v.

AMADO SALAZAR CALDERON, et al.,

Respondents

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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Attorney for Respondents

IN THE
UNITED STATES SUPREME COURT

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,	*	No. 85-849
Petitioners	*	
v.	*	
AMADO SALAZAR CALDERON, et al.	*	RESPONDENTS' BRIEF IN OPPOSITION
Respondents	*	

The Respondents, 492 Mexican farm workers, respectfully request this Court to deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 765 F.2d 1334.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO CONFLICT IN THE CIRCUITS WITH REGARD TO ISSUE ONE AND PETITIONERS ARGUMENT IS WITHOUT MERIT

The Farm Labor Contractor Registration Act (FLCRA) provides for the award of actual or liquidated damages to a person aggrieved by the violation of FLCRA "if the court finds that the respondent has intentionally violated any provision of this Act..." 7 U.S.C. §2050a(b)(1977). In construing the word intentional, the Court of Appeals applied the test set out in an earlier case, Castillo v. Givens, 704 F.2d 181, 197-98 (5th Cir.) cert. den. ____ U.S. ___, 104 S.Ct. 160 (1983).

> Intentional means "conscious or deliberate" Id. at 197; there is no requirement of a specific intent to violate the FLCRA; rather the standard for an intentional violation [is] ...'the common civil standard which holds a person liable for the natural consequences of his or her acts.' Id. at 197-98.

Salazar, 765 F.2d at 1345.

Petitioners complain that this definition of "intentional" is too broad. However, every court which has construed FLCRA has applied a similar definition. See Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1224 (7th Cir. 1981); Stewart v. James, 519 F.Supp. 315, 321 (E.D.N.Y. 1981); DeLeon v. Ramirez, 465 F.Supp. 698, 705 (S.D.N.Y. 1979). These decisions are in accord with cases construing the word "intentional" in other remedial statutes, such as Title VII, 42 U.S.C. § 2000e-5, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9th Cir. 1972); Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246 (3rd Cir. 1973), and the Truth In Lending Act, 15 U.S.C. §1640(c), Ratner v. Chemical Bank and N.Y. Trust Co., 329 F.Supp. 270, 281-282 (S.D.N.Y. 1971). These decisions are also in accord with the general construction of the word "intentional" utilized by

this Court. See Ellis v. U.S., 206 U.S. 246, 257 (1907).[1] In the face of such unanimity among the courts there is no reason to grant certiorari.

Petitioners' argument that the Fifth Circuit's construction of the word "intentional," conflicts with this Court's construction of the word "willful" in Thurston v. Trans World Airlines, ____ U.S. ____ (1985) is frivolous. "Intentional" and "willful" are different words, and have different meanings in the law. "Willful" carries a connotation of specific intent which is entirely absent in the word "intentional." Compare Thurston, supra, with Ellis supra. This difference in meaning is reflected in the different ways in which the words are used. "Intentional" is used in FLCRA to define the standard for civil liability; no damages or other relief of any kind may be awarded unless a violation is at least "intentional." 7 U.S C. § 2050a. "Willful" is used to define the standard for imposing FLCRA criminal sanctions. 7 U.S.C. § 2048(a). In the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621, the statute construed in Thurston, "willful" is used to define those violations which are

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[1] Ellis was a criminal case for employing workers in excess of 8 hours per day. Writing for the court, Justice Holmes stated:

> The argument against the [jury] instruction is that the word "intentionally" in the statute requires specific knowledge of the law; or at least that, to be convicted, Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.

206 U.S. at 257.

sufficiently egregious that they merit the award of punitive liquidated damages in addition to compensatory damages. Civil liability may be imposed under the ADEA whether or not a violation is "willful." Plainly, "intentional" and "willful" mean different things and are used in different ways in FLCRA and the ADEA. Petitioners argument that the two should be construed to mean the same thing is without merit.

II. PETITIONERS' SECOND ISSUE IS NOT PRESENTED BY THE RECORD IN THIS CASE.

The second question presented by the Petition for Certiorari argues that the petitioners should not be held liable for the 3/4 work guarantee required by DOL regulations because DOL never informed the Petitioners they had to pay the guarantee. Even overlooking the dubious merits of Petitioners argument, the record in this case does not allow the Court to decide the question presented. The record is replete with evidence that DOL repeatedly informed the petitioners of the requirements of the H-2 regulations including the 3/4 guarantee requirement. DOL representatives met personally with petitioners on several occasions; they sent copies of the DOL regulations to petitioners; they even traveled to Presidio to explain the regulations to the entire Association membership. To reach the question presented the court would first have to wade through the massive factual record in the case and conclude, contrary to the lower courts, that the petitioners had no knowledge that the guarantee was required. Such an effort could have no importance to anyone other than the parties to this case and would be a waste of this Court's time.

Petitioners argument that the Court of Appeals engaged in improper fact finding is similarly without merit and unworthy of review. The district court considered the facts surrounding the 3/4 grarantee requirement and excused compliance with the guarantee solely because of the hardship it imposed on the growers. The Court of Appeals reversed, not because it took a different view of the facts, but because it found, as a matter of law, that it was improper for the district court to consider hardship. 767 F.2d at 1342-43; A-43. The cases cited by the Court of Appeals fully supported that conclusion. Thus, petitioner's second issue rests on a misunderstanding of the Fifth Circuit opinion and is not, in fact, presented by the record in this case.

III. PETITIONERS THIRD ISSUE PRESENTS ONLY FACTUAL QUESTIONS THAT ARE NOT WORTHY OF REVIEW

Petitioners third issue challenges the Fifth Circuit's decision to allow the district court to decide on remand whether respondents waived their claim to actual damages. This issue presents no questions of law; it turns entirely on a factual analysis of the voluminous and convoluted record to determine whether respondents intended to waive their claims. That record is sufficiently difficult to decipher that the Court of Appeals could not decide whether a waiver had occurred and remanded to the district court to decide in the first instance. 765 F.2d at 1349 n.13; A-56. If the Court of Appeals did not feel competent to resolve this factual dispute, there is surely no reason for this Court to try.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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